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# WORKING PAPERS ON PORNOGRAPHY AND PROSTITUTION

## Report # 15

### A CONTENT ANALYSIS OF SEXUALLY EXPLICIT VIDEOS IN BRITISH COLUMBIA

by  
T.S. Palys

POLICY, PROGRAMS  
AND RESEARCH BRANCH  
RESEARCH AND  
STATISTICS SECTION





Department of Justice

WORKING PAPERS ON  
PORNOGRAPHY AND PROSTITUTION


A CONTENT ANALYSIS OF  
SEXUALLY EXPLICIT VIDEOS  
IN BRITISH COLUMBIA

T.S. Palys, Ph.D.  
Department of Criminology  
Simon Fraser University

June, 1984

Research Report no. 15

CANADA



Department of Justice

MINISTER OF JUSTICE  
FORN AFFAIRS AND TRADE

A COURT ORDER  
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The Research Team

Gloria Baker-Palys, M.A.  
Department of Psychology  
University of British Columbia

Susan Bluck, B.A.  
Department of Psychology  
University of British Columbia

Deborah Landy, R.P.N.  
Regional Psychiatric Centre  
Correctional Services of Canada  
Abbotsford, British Columbia

John Olver, B.A.  
Department of Criminology  
Simon Fraser University

T. S. Palys, Ph.D.  
Department of Criminology  
Simon Fraser University





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Note that the views expressed in this report are those of the author, and do not necessarily represent the views of the funding agency or of any of the persons named in these acknowledgements.

T.S.P.

Burnaby, British Columbia  
15 June 1984





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## I. Introduction

The video rental/sales industry is a particularly interesting one when considering policy development in the area of pornography and obscenity. It is, first of all, a very new industry. Most outlets in the Vancouver area have been in existence for less than four years. Yet, within that space of time, the industry has burgeoned into a major component of the recreation market. The sheer importance of video as a social phenomenon flags it for empirical scrutiny.

The video industry is further unique in so far as it is less regulated than, for example, the movie theatre industry. While any movies which will be shown in public theatres require preliminary screening by the Film Censor or Classification board of the appropriate province, this is not the case for video cassettes.<sup>1</sup> Consequently, the video industry is a much more "free" market in determining the nature/content of its offerings, as are the consumers of video who, it would appear, are offered a broader range of material for their visual consumption. Nonetheless, it is also true that video outlets must live within the constraints of existing licensing

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<sup>1</sup>The reason for this is that video cassettes are considered materials for home (ie., private) consumption, and hence lie outside Censor Board mandates. On the other hand, it should be noted that there is some evidence this situation may change somewhat. The Province of Ontario, for example, has proposed legislation which would bring home videos under Film Censor Board control. It is the only province, to date, to have made any concrete moves in this direction.



regulations, obscenity legislation, and a host of other legislative statutes (eg., laws governing unauthorized copying of video materials), as well as with the views of the public who are their clients, and, occasionally, their critics.

Unfortunately, the video industry to date has been the site of much fire, but little light, particularly that element of the video industry which deals with 'pornographic' materials. Thanks to movies like the National Film Board's Not a Love Story , a never ending stream of newspaper articles (eg., Morgan, 1984; Proulx, 1984), the publicity surrounding the occasional trial of a video outlet on obscenity charges, (eg., "B.C. Video firm fined for renting 'snuff' film", 1984), and a strong anti-pornography lobby, many of us "know" the kind of content that exists in video 'pornography': it is graphically sexual, depicts violence against women, encourages rape myths and other anti-female attitudes, and is a repository for "actors" and "models" who lack the necessary skills and attributes to make it in more legitimate media. Further, our beliefs of what is "out there" manifest themselves in action. Members of the video industry in Vancouver who specialize in sexual material have been the object of demonstrations and anti-publicity, firebombings, and licensing regulation designed to curtail the availability of "pornography".

Yet it is often those things we feel we "know" best that deserve the closest scrutiny. The primary purpose of the present research was to shed some preliminary light on the video

rental/sales industry, particularly that portion of the industry dealing in "pornographic" materials.

It should be noted that there are many different ways that "pornography" can be defined. One can focus on legal definitions of pornography, ie., the way the term has been defined in the Criminal Code, and the way it has been interpreted in the courts, (eg., see Boyd, 1984; Price, 1979). A second alternative is to assess pornography's social definition, ie., the way people in general use the term. Wilson (1973) has provided such an overview of pornography's etymology. More recently, Palys, Olver & Banks (1984) have addressed the transition in the social definition of pornography that has occurred over the last decade, since the entry of feminist theory into the pornography debate. Finally, a third definition might be considered a pragmatic one, ie., what do you get when you go out and look for some? That was the focal question that the current study attempted to address in systematic fashion.

In the course of doing this research, we also attempted to gather some preliminary information about the video industry itself by holding both formal and informal discussions with various individuals within the criminal justice system and the video industry. A special focus was on the proprietors of the video outlets: What were their attitudes toward pornography? Why had they chosen to deal or not deal in "pornographic" videos? What could they tell us of their clientele? What were their feelings regarding current or proposed legislation in the

"obscenity" realm?

In sum, two studies were completed for the purposes of this report. The primary one involved a systematic content analysis of sexually explicit video cassettes available in Vancouver, British Columbia, and environs. The secondary research focus was on the video industry itself, and involved observation of procedures within video outlets, as well as formal and informal interviews with the clerks and proprietors of the video outlets we sampled. The current report is structured around the first study. Chapter Two details the procedures that were followed in gathering and coding material, while Chapter Three presents the results of this analysis. A summary of these results and a discussion of some of their implications are included in Chapters Four and Five. Rather than present the results of the second study separately, the decision was made to use this material wherever it would provide useful contextual information or help to explain the results of the content study.



## II. Procedures

### 1. The Research Site

The research was performed in the Greater Vancouver area of British Columbia. This area has earned the dubious distinction of being the "pornography capital of Canada" (eg., see Barlow, 1983; Morgan, 1984) due to the broad availability of 'pornographic' materials in the area, and Vancouver's apparent centrality as a point for video materials coming from the United States for subsequent distribution to the rest of Canada. In this sense, the Vancouver area seemed an ideal location in which to assess the content of video pornography.

Video outlets, by and large, tend to serve a very local, neighbourhood clientele. Most of the video proprietors with whom we spoke indicated that the majority of their customers lived within a 1-2 mile radius of the outlet. Consequently, the decision was made to select several different types of communities or areas in order to represent a cross-section of outlets and markets. Four areas were chosen: (1) The 'West End' area of Vancouver -- this is a high density, urban area, where the residents are primarily younger, single, and more transient, but where considerable heterogeneity exists regarding wealth, education, and social position; (2) A portion of Vancouver's

'West Side' area, specifically Kitsilano and Kerrisdale -- these communities comprise more residential, urban neighbourhoods, where either gentrification or continued opulence have occurred, and where residents tend to be fairly well-educated, middle or upper-middle class, and largely in professional occupations; (3) The northern portion of Vancouver's 'East Side' -- this area represented a second residential urban neighbourhood, and is ethnically heterogeneous and primarily "blue-collar" or "working" class; and (4) a large suburban area that actually comprised four separate and diverse communities -Port Moody, Coquitlam, Port Coquitlam, and New Westminster -- which, collectively, contained all the heterogeneity of the three Vancouver areas.

## 2. The Video Outlets

Within each area, an exhaustive inventory was first made of all outlets which rented video movie cassettes.<sup>1</sup> The list was initiated from entries from the yellow pages of the relevant telephone directories, and then supplemented and updated by driving around the areas in question. Sampling then proceeded within each area depending on the number of outlets in that

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<sup>1</sup>It should be noted that the VHS format cassettes dominate the Vancouver market. Many outlets we sampled had their offerings in both VHS and Beta format, while many were VHS-only, but none of the outlets in our sample areas was Beta-only. Consequently, the decision was made to focus on video cassettes in VHS format in this study, since it offered the opportunities for the most comprehensive assessment.

area. Areas 1,2, and 3 were found to have 5,9 and 11 outlets, respectively, and all of these outlets were included in the study. The suburban area (Area 4) was found to have a total of 32 outlets, of which 18 were ultimately included in the study. The 43 sample outlets included independent operations, as well as those which were part of local, provincial, national, and international chains. The sample also included both "sex specialist" outlets (ie., where the vast majority of business in the outlet came from making available and renting sexually explicit tapes), and "general purpose" outlets (ie., where the outlet's main business came from renting the regular visual fare one might otherwise see at the local movie theatre).

### 3. Video Tapes Sampled

The principal objective in this research was to ascertain the content of 'pornographic' video materials available to residents of Vancouver and environs. Consequently, the study was conducted in a manner consistent with those objectives, ie., by approaching outlets in the role of consumer, and renting videos which met the criteria (described below) for inclusion in the study. As this implies, video outlets were never made aware that their video stock was being scrutinized for research purposes, since it was felt that notifying proprietors of this fact ahead of time might influence the type of materials made available. Rather, movies were rented (typically two at a time), coded, and



returned to the outlet within a one day rental period.

Two categories of tapes were sampled for this research. The first are known as "adult" or "restricted" or "X-rated" tapes. While these tapes have sexual content, their "single-X" rating is typically due to the fact that no 'real' sexual activity is depicted. One typically sees full or partial nudity, ambiguous sexual activity, or, quasi-explicit sexual activities where camera angles and distances are carefully chosen so as to clearly convey the nature of the activity taking place, but to not actually depict it in graphic terms. In other words, in "X-rated", "adult" material, even at its most graphic, one could not tell for certain whether the act was 'really' occurring or merely being simulated. These movies are produced and distributed both by major studios as well as those who produce/distribute 'pornography', and are 'legal', at least with respect to The Copyright Act, in every sense of the term: they are virtually all 'original' copies distributed by the production studios, they cross the border legally, and they are available in virtually every video outlet into which you might walk. In "general purpose" outlets, these videos may be sectioned apart from other offerings and placed under an 'adult' heading, and video proprietors frequently place videos with more suggestive titles or cover photos on higher shelves out of the sight and reach of smaller children. These precautions are typically not seen in "sex specialist" outlets, however, since one must normally be over the age of majority to even enter the

outlet.

The second type of videos are known as "Triple-X" videos, and acquire their status by depicting sexual activity in very graphic fashion. Camera angles and distances are carefully chosen in such a way as to make it obvious that the activity is not being simulated. Single copies of triple-X originals are apparently brought across the Canada/U.S. border illegally, and multiple 'pirate' copies are then made for further distribution in the Greater Vancouver area and the rest of the country.<sup>2</sup> The originals themselves are illegal, since they were smuggled across the border, but the copies made from them are not, because they have been generated in Canada, where no copyright law protects them from such unauthorized copying.<sup>3</sup> In some instances, local 'piraters' are reputed to pay voluntary royalties to the American distributors; in other instances, they do not.

Unlike the "X-rated" videos, "Triple-X" videos were not available in all outlets we contacted. Certainly all "sex

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<sup>2</sup>Although there are apparently numerous individuals who 'pirate' and distribute triple-X material, most of these are small-time operators who make relatively few copies and sell out of the trunks of their automobiles. Only two major distribution sources exist in this area, to my knowledge. Both distribute locally, as well as by mail to the rest of the country, although one seems to dominate the local market, while the other seems more involved in the mail-order trade.

<sup>3</sup>As a point of clarification, it should be noted that the 'legality' referred to in this section refers solely to the legal status of these tapes vis-a-vis copyright legislation. The status of both adult and triple-X videos with respect to other statutes, eg., obscenity provisions, is another matter.

specialist" outlets stocked them, since these are their *raison d'etre*. These outlets would have signs on their exteriors indicating that only those over the age of majority could enter, and would post messages in the outlet, on the video cassettes, and even on the video image itself to the effect that the video contained uncut sexually explicit images, and that those who might be offended should not watch. An outlet of this type might have up to 1000 different triple-X titles available, and the general content of any given video could be ascertained by asking the clerk or checking with any of several 'trade' magazines typically available in the outlet.

"General purpose" outlets who carried triple-X stock (and most of them did), on the other hand, were more variable in their representation of this material. All tended to separate them from the rest of their stock in some fashion. Some displayed them openly, in the sense that the stack of videos, with titles showing, might be kept in a glass case or on a side counter.\* More frequently, however, proprietors of these "general purpose" outlets would keep these titles "under the counter" or in some other unseen location, such that (a) one had to know that such material exists; and (b) one must actually ask to see the list of titles. Customers to whom neither (a) nor (b) applied might deal at length with the outlet, and never even realize that movies of this sort were available. Finally,

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\*Note that the original video boxes were never on display in these outlets, since the triple-X videos were always 'pirate' copies, and hence no boxes were available.



several outlets also added the additional requirement that only "members" could rent triple-X material.<sup>5</sup>

Our intent was to sample 'adult' and 'triple-X' movies. Upon initially approaching an outlet, some time would first be devoted to looking around the outlet and talking to the clerk on duty in order to ascertain the existence and location of sexually-oriented video stock. Once located, two titles would be randomly chosen (using a list of random numbers) and rented. If the outlet dealt in both adult and triple-X titles, then one would be chosen randomly from each set. If the outlet dealt in only one type of material, then both selections would come from that list. This process continued until 125 movies were chosen and coded. Some outlets were sampled only once, while others were sampled on several occasions.

A further 25 movies were chosen on a more intentional basis, and were motivated by efforts to discover the 'worst' pornography available. This was guided by several strategies. First, a list was obtained of videos that had been charged in Ontario and British Columbia with violations under the obscenity section (159) of the Criminal Code, and we monitored all outlets for the appearance of these titles. Second, a number of trade magazines were perused for information concerning titles which

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<sup>5</sup>Memberships were free of charge at some outlets, but might cost up to \$25.00 at others. In either case, one had to produce identification -- usually a driver's license and major credit card -- which conveyed to the proprietor (1) one's age; (2) one's address; and (3) that one had an established credit rating.

included violence and/or sexual violence, and all outlets were again monitored for these titles. Third, on the assumption that the titles themselves might convey information to those with an appetite for more coercive sexual fare, we paid particular attention to videos whose titles contained words like "nasty", "wicked", "captive", and "prisoner", or which implied young participants. And finally, two of the coders also frequented several video establishments that were considered most likely to rent questionable material. This was done on the assumption that demonstrating oneself to be a regular consumer of explicit material might open doors to other material not available to most renters.<sup>6</sup>

In sum, a total of 150 videos were sampled for this research. Fifty-eight of these were classified "adult", while 92 were labelled "triple-X". And while most were merely randomly sampled, efforts were also made to secure the most damaging evidence we could find concerning the content of video pornography.<sup>7</sup>

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<sup>6</sup>In his summation prior to sentencing a suburban video outlet for possession and distribution of obscene material, the judge alluded to the testimony of the undercover operator who rented the movies against which charges had been laid. It revealed that the operator first established himself as a consumer of explicit material, and then requested and was given access to two 'snuff' movies. We, on the other hand, never saw such material. While this may be a commentary on the inadequacy of our procedures, rather than on the lack of availability of such material, it nonetheless suggests that such material is at least not immediately available to the average Vancouver area resident who rents sexually explicit video material.

<sup>7</sup>It should be noted here that the safest assumption to be made about video pornography (or materials in any medium) is that anyone can obtain anything they want if they have the right

#### 4. The Coders

A total of five coders were involved in this research. Three of the coders were female while two were male, and all had at least one university degree in a social science discipline. All of the coders are movie and/or video consumers, although only one of the coders could be considered a 'film buff'. One of the coders had seen several triple-X films before, another had seen several erotic and pornographic films in the context of a university course she had taken, while the remaining three (including the author) had never seen a triple-X film prior to their involvement in this research.

#### 5. The Coding Scheme

The coding scheme was developed by the author for this study, since no other adequate coding scheme was found.<sup>8</sup> Our objective was to code videos in terms of the presence of sex,

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<sup>7</sup>(cont'd) contacts, have enough money, and are willing to go through enough trouble to get it. The current study focussed on the nature of material to which the average Vancouver area resident, living in the "pornography capital" of Canada, would be exposed if he/she wanted to obtain sexually-oriented video material. Within that objective, I feel confident that our data provide a representative picture of what exists.

<sup>8</sup>On the other hand, it should be noted that the U.S. National Coalition on Television Violence coding scheme included several useful features that were incorporated into or adapted for the present study.

aggression, and sexual aggression and, to the extent that these were present, to code both the content and nature of these depictions. Only an overview of the coding scheme will be presented here; the detailed manual and coding sheets may be seen in Appendix A.

Coders began by completing a "cover sheet" for each movie, in which a variety of information about the video was coded (eg., year of production, type of outlet from which it was rented, whether the tape appeared to be an 'original' or 'pirate' copy, whether any editorial information was included with the video, and so forth). Once completed, coders then turned to the movie itself.

The basic unit of analysis for each video was "the scene", which was defined as "an uninterrupted sequence of activity in a given physical context".<sup>9</sup> Upon viewing a scene, the coder first decided whether sex, aggression and/or sexual aggression were depicted. If they were not, the scene was merely tabulated, but not coded. If one or more of the three were present, however, then the coder would complete one "scene coding sheet" for each dimension that was present, since we had separate, but parallel, coding sheets for each type of activity.

For coded scenes, coders first rated sexual activity (in the context of both sexual activity per se, and in sexual aggression) in terms of its sexual explicitness, and aggressive

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<sup>9</sup>The reader is encouraged to read the coding manual in Appendix A for a more elaborate description of how scenes were partitioned.



activity (in the context of both aggression per se and sexual aggression) in terms of the severity of aggression depicted. These scales were 7-point scales, but were constructed in such a way that scale points 1,3 and 5 were critical in defining the explicitness and/or severity of the activity depicted. These scale points were typically tied to particular kinds of activity, although coders were given 'discretionary' points to raise or lower the rating for a given scene, depending on the nature of the depiction. For example, a graphic sexual depiction involving intercourse would normally be scored "5", but might be reduced to "4" if the depiction was very brief or ambiguously depicted (eg., in partial darkness, or in a steamy shower), or increased to "6" if the depiction was of extended duration, involved multiple activities, and/or was significantly more graphic than was normally the case (eg., extreme close-ups of penetration). These discretionary points were to be infrequently utilized, however, and coders in fact used them as instructed.

The next matter of interest concerned the participants in the interaction. Interactions were divided into two phases: (1) the initiation of the interaction; and (2) the interaction in progress. In both cases, interactions were first coded as to whether they were (1)mutual, ie., all participants were willingly involved in egalitarian roles; (2) unidirectional or imbalanced, ie., one or more persons tended to be the dominant figure(s) in directing the course of the sexual interaction or, in the case of aggression and/or sexual aggression, there were

clear perpetrator/victim roles; (3) solo, ie., participant(s) were performing the action by themselves (eg., taking a shower alone, masturbating, committing suicide); or (4) unclear, ie., one could not tell the nature of the dynamic due to the brevity of the depiction, the fact that the scene was already in progress, and so forth.

If the scene was mutually initiated, or a 'solo' scene, then all participants were aggregated and merely coded as to their number, sex (ie., gender), and apparent age (ie., adult versus adolescent versus child).<sup>10</sup> If the scene involved an imbalance, however, then characteristics (ie., age, sex, number) of those in the dominant/submissive or perpetrator/victim roles were coded separately. Coding in this way allowed us to ascertain the prevalence of "kiddie porn" in our sample tapes, (at least as perceived by the coders), as well as to determine the frequency with which particular age and/or sex groupings were involved in different roles.

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<sup>10</sup>The reader should appreciate that making judgements about age can be a difficult task. Nonetheless, a person was considered a 'child' if they were prepubescent, and an 'adolescent' if they were post-pubescent but, in the judgement of the coder, would probably have difficulty getting a drink in a bar without producing identification. All others were considered 'adults'. Any difficulties which arose were in the distinction between 'adolescent' and 'adult'. While none of the coders perceived any instances in which adolescents were portrayed as adults, there were numerous instances in which individuals played adolescent roles (eg., members of a high school class), although they were clearly in their late 20's or early 30's. Ultimately, we came to make our judgements of whether someone was an 'adolescent' on the basis of (a) whether the person was portrayed as an adolescent; and (b) whether the portrayal was at all believable.

Scenes involving sexual activity were also coded for affect, or emotional tone. Our interest in including this judgement stemmed from the feminist distinction between "erotica" and "pornography", where erotica is seen as a loving, affectionate, egalitarian relationship, while pornography is defined as involving power imbalance and coercion (eg., see Steinhem, 1980; Wachtel, 1979). During pretesting of the coding scheme, it became clear that many sexual depictions existed which fit in neither category. These were depictions in which two (or more) consenting individuals came together and engaged in sex and, while the depiction was not at all coercive, nor was it particularly loving and affectionate. Given that we were interested in the frequency of occurrence of truly erotic scenes (in the feminist sense), we consequently asked coders to make judgements about each sexual depiction in terms of whether it was (1) 'erotic', ie., a mutually enjoyable, affectionate, egalitarian relationship that seemed more than 'just sex'; (2) 'positive', ie., the relationship was not erotic as defined above, but nonetheless depicted consenting individuals all apparently enjoying the activity; (3) 'neutral or mechanical', ie., a 'robotic' depiction of sexual activity; (4) 'negative', ie., one or more of the participants seemed uncomfortable with the setting or activity; or (5) 'very negative', ie., where all participants seemed uncomfortable about the proceedings. The latter two categories were rarely found, since the existence of negativity frequently took coders into the realm of sexual

aggression rather than sex per se; the primary intent of this rating was to differentiate sexual depictions in the first three categories.

The actual content of the activity was then coded. Up to 15 categories were available within each domain of activity, and coders were instructed to check off all those that appeared in the given scene. One or more "other" categories were also supplied.

Finally, upon completion of the video, coders were asked to complete an "overall review sheet" which summarized the number of scenes in the video, the number involving the different types of activity (or their absence), as well as to supply a number of impressionistic judgements concerning the treatment of various types of themes in the movie. It was fully anticipated that these thematic judgements would likely be less reliable than other elements of the coding scheme, but the questions were deemed important to ask (eg., Were there negative consequences to sexual activity? Were aggressors depicted positively? Did this film promote rape myths?). Once again, the reader is referred to Appendix A for the complete coding sheets and a detailed description of coding definitions and procedures.

Given that the coding scheme was developed expressly for this study, considerable effort was expended in its development. We went through several iterations of the author preparing a preliminary manual, the coders reading it, all of us getting together to pretest it on an actual movie, finding its



inadequacies, rewriting the manual, further pretesting, and so on. But ultimately the day arrived when we felt comfortable with the coding scheme and our ability to use it. One adult and one triple-X movie were then rented for the purpose of assessing reliability, and each coder coded the movies independently. An initial weak point in the coding scheme involved the division of scenes, but when "scene" was held constant, exact inter-rater agreements<sup>11</sup> on all coded indices were 76.9 per cent overall. The worst inter-rater agreement was found on the coding of the initiation of the interaction, where mean agreement across coders was only 47.8 per cent. The identification of scene content codes was most reliably coded, with a mean of 91 per cent agreement across coders.

The initiation code was deemed substandard, and hence that aspect of the data has been ignored in this report. Once removed, average exact inter-rater agreements on all coded indices then surpass 80 per cent, which is in accord with

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<sup>11</sup>The word 'exact' should be emphasized here, since reliability was assessed not by correlating sets of figures between coders, but by comparing codes on the various indices and requiring that any pair of coders had to have exactly the same information before it would be considered an 'agreement'. Correlations pay heed to numerical proximity (eq., if two coders give ratings of 4 and 5, this is treated as less problematic than if the coders were to give ratings of 1 and 5), while the 'exact' criterion used here did not (ie., both of the examples cited here would have been considered 'errors'). While one's reliability figures often don't 'look' as good in the latter case, ie., it is a more stringent criterion, it is a better indication of the interchangeability of coders. That we were able to surpass traditional psychometric criteria despite this more stringent criterion of agreement, reflects positively on both the coding scheme and the coders.

traditional psychometric criteria.<sup>12</sup> Nonetheless, following a final discussion of these results with coders, and further elaboration of our definitions (particularly regarding the division of scenes and the affect codes), a final version of the manual was prepared (see Appendix A) which governed all subsequent coding. Coding then commenced at three independent sites.

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<sup>12</sup> With the initiation codes removed, the 'worst' inter-rater reliability is then associated with the 'sexual affect' ratings, which had a mean overall agreement across coders of 60.5 per cent. While only tolerable, this rating was considered too important to delete, and hence appears in this report. It implies, however, that results involving this index should be treated with some caution.

### III. Results

A total of 150 movies were coded, of which 58 were classified 'adult' and 92 were classified 'triple-X'. These tapes were rented from 43 different video outlets in the Vancouver area, and are listed in Appendix B. Of the 126 movies for which we were able to acquire information concerning year of production, 101 (or 80%) were released in the 5 year period 1979 to 1983 inclusive, with 1982 being the modal year of release (29, or 23% of the titles). The remaining movies spanned the period 1961 to 1984, with the distribution being quite negatively skewed.

As Table 1 reveals, the movies we viewed had been produced primarily in the United States (111 movies, or 89% of the 125 movies for which we were able to acquire production location information), and this was true for both types of movies. There is undoubtedly some bias in this figure, however, since the documentation we were able to obtain provided more extensive production information on American movies. Nonetheless, even if none of the 25 movies for which this information was unavailable were American (a dubious possibility), one is still left with 74% American content (111 out of 150 movies). Within the United States, it is clear from Table 1 that most of the movies

Table 1

Production Location Information  
for Sampled Videos

Country (State)	Triple-X	Adult	Totals
United States . . . .	75	36	111
(California)	(61)	(14)	(75)
(New York)	(09)	(01)	(10)
(Nevada)	(02)	(00)	(02)
(Illinois)	(00)	(01)	(01)
(Ohio)	(01)	(00)	(01)
(State Not Known)	(02)	(20)	(22)
Canada (all Quebec) .	0	5	5
Italy . . . . .	0	3	3
France . . . . .	0	3	3
England . . . . .	0	2	2
Germany . . . . .	1	0	1
Country Not Known . .	16	9	25
TOTALS	92	58	150

originated, more specifically, from California.<sup>1</sup>

<sup>1</sup> One explanation for the large number of Californian movies in our sample is that British Columbia is closer to California than, say, New York, and hence more likely to receive movies from the west coast of the United States. On the other hand, we were able to acquire documentation concerning 32 American producer/distributors of 'pornographic' films, and 25 of these were located in California. Thus, it would appear that the triple-X film production market, like the 'legitimate' film market, is centered largely in that state.



The 150 movies contained a grand total of 4,203 separate scenes, of which 2,101 scenes (or 50%) were not coded (ie., because they did not include sex, aggression, or sexual aggression), while the remaining 2,102 scenes were coded for sex, aggression and/or sexual aggression. The most prevalent category was sex, which appeared in 1,626 scenes (38.7% of all scenes, or 77.4% of all coded scenes). Next most frequent was aggression, which appeared in 393 scenes (9.4% of all scenes, or 18.7% of coded scenes). Sexual aggression was least frequently portrayed, although it nonetheless appeared in 266 scenes (6.3% of all scenes, or 12.7% of all coded scenes). On the other hand, there were some substantial differences between the adult and triple-X movies on these indicators.

First of all, the adult movies were found to contain significantly more scenes per movie than the triple-X films (means were 38.5 and 23.9 scenes per movie, respectively;  $F=34.51$ ,  $df=1,149$ ,  $p<.001$ ), as well as more non-coded scenes per movie (means were 20.4 and 10.9 non-coded scenes per movie, respectively;  $F=25.03$ ,  $df=1,149$ ,  $p<.001$ ). To the extent that the number of scenes and the number of non-coded scenes are indicators of time spent on plot or plot development, these figures would seem to indicate that the adult films expended more effort in this direction than did triple-X films. It is interesting to note, however, that when we examined our data for changes over time (ie., by correlating these indicators with year of production), we found that the number of scenes and

number of non-coded scenes showed a tendency to decrease over time in the adult category ( $r = -.38$ ,  $p < .004$ ;  $r = -.43$ ,  $p < .001$ , respectively), while they showed a tendency to be increasing over time in the triple-X category ( $r = +.18$ ,  $p = .13$ ;  $r = +.26$ ,  $p < .03$ , respectively). We will now turn to a more detailed examination of the depictions which involved sex, aggression, or sexual aggression.

### 1. Sex

A scene was deemed to involve sex, and hence to be coded using the coding sheet for that dimension, if (any of) the focal participant(s) in the scene (a) was/were wearing any less clothing than one might wear on a public beach; or (b) was/were involved in any lascivious action, even if fully clothed, that would be noticeable and deemed inappropriate in a dimly lit, but public bar. Furthermore, it must have been the case that the participant(s) were portrayed as having entered the scene willingly (rather than being coerced or deceived), and there must not have been any overt aggression displayed as part of the sexual activity (eg., as in sado-masochism). The presence of either of these latter two criteria were deemed to make the scene one of "sexual aggression" rather than of sex per se.

## A. Frequency

As may be seen in Table 2, there was little difference between adult and triple-X videos in the absolute number of scenes which we coded as involving sex ( $F < 1.0$ ), although the triple-X movies were found to comprise a significantly greater proportion of sex scenes relative to the total number of scenes in the videos ( $F = 23.8$ ,  $df = 1, 149$ ,  $p < .001$ ) as well as to the total number of codeable scenes ( $F = 26.0$ ,  $df = 1, 149$ ,  $p < .001$ ). Further, the temporal analyses revealed that adult movies were showing a tendency toward larger numbers of sex scenes ( $r = +.23$ ,  $p = .08$ ), and a significantly larger proportion of sex scenes relative to codeable scenes and scenes in total ( $r = +.52$ ,  $p < .001$ ;  $r = +.44$ ,  $p < .001$ , respectively). In contrast, triple-X movies were remaining relatively constant over time in the absolute number of sex scenes per video and in the proportion of codeable scenes devoted to sex, but showed evidence of a significant decrease over time in the proportion of scenes that were devoted to sex in the movie as a whole ( $r = -.34$ ,  $p < .005$ ).

## B. Explicitness

One should note that 'sex', as defined in our coding scheme, was a relatively broad category, however, and included everything from partial nudity to very graphic sexual activity. Thus, while it may be true that the absolute number of 'sex'

Table 2

Comparisons Between Adult and Triple-X Videos  
on Four Indicators of Sexual Depictions

Sexual Indicator	Mean for Adult Videos	Mean for XXX Videos
Number of scenes in video coded for sexual content.	10.9	10.8
Sex scenes as a percentage of all scenes in the video.	36.8%	55.9%
Sex scenes as a percentage of codeable scenes only.	64.2%	82.4%
Rated Explicitness of sex scenes.	1.83	4.17

scenes in adult and triple-X movies were quite similar, it was also true that the sexual depictions in the triple-X movies were, overall, significantly more explicit<sup>2</sup> (mean explicitness ratings for the adult and triple-X films were 1.83 and 4.17,

<sup>2</sup>As was noted earlier, the explicitness ratings were made on a 7-point scale, where points 1, 3, and 5 were most elaborately defined, and all other scale points were defined in terms of those three. Generally, a "1" was coded whenever full or partial nudity was depicted but other sexual activity was absent. A code of "3" designated both (1) nudity accompanied by 'foreplay' types of activities (eg., fondling, caressing, kissing of non-genital areas); and (2) more intimate sexual activities where one could not tell for certain whether the activity was real or simulated. Finally, a code of "5" designated graphic sexual activity in which it was clear that the sexual activity being depicted was not being simulated. The reader is encouraged to refer to Appendix A for a more detailed delineation of the criteria governing the coding of sexual explicitness.



respectively, on the 7-point scale;  $F=338.0$ ,  $df=1,149$ ,  $p<.001$ ). The temporal analyses revealed that the average sex scene in triple-X films has remained fairly consistent in its level of explicitness over time (undoubtedly a ceiling effect), while the adult films have revealed a non-significant tendency to increase in sexual explicitness over the years ( $r=+.22$ ,  $p=.11$ ).

### C. Affect

A central interest in this research was not only the frequency and explicitness of sexual activity, but also the nature of these sexual depictions, ie., in terms of affect, type of activity, and the characteristics of participants and their roles. Coders were asked to make judgements about the affect or emotional tone of each sexual depiction on a 5-point scale which ranged from 'erotic' ("1") to very negative ("5"), and the distribution of judgements for each video type (expressed as a percentage of sexual scenes within that video type) are shown in Table 3. More than half the scenes in both types of movies were coded as "positive" (ie., where all participants were depicted as enjoying the activity), while more than a third of the sexual depictions in both the adult and triple-X videos were coded as "neutral" or "mechanical" in affect (ie., neither negative nor positive; a somewhat 'robotic' depiction of persons going through the actions with negligible emotional tone; also for those depictions which were too brief or ambiguous in

Table 3

Distribution of Judgements of  
Perceived Affect of Sexual Depictions  
in Adult and Triple-X Videos

Coded Value	Perceived Affect	Adult Videos	Triple-X Videos
1	'Erotic'	2.6%	3.2%
2	Positive	52.0%	56.1%
3	Neutral/Mechanical	35.1%	35.0%
4	Negative	8.8%	5.3%
5	Very Negative	1.4%	0.4%

establishing tone). Only a minute proportion of depictions (2.6% of adult sex scenes and 3.2% of triple-X sex scenes) were coded as truly 'erotic' in the feminist sense, ie., not only enjoyable for participants, but also a loving, affectionate, egalitarian depiction. Overall, it was found that sexual depictions in triple-X films were significantly more positive than those in the adult films ( $F=6.60$ ,  $df=1,149$ ,  $p<.01$ ), but the small magnitude of difference and the marginal reliability of the affect ratings do not allow much confidence to be placed in the validity of this difference.

#### D. Content

The differences between adult and triple-X videos continued when we looked at the type of interactions depicted, as well as their participants. Within adult videos, we found that 48.5% of the sexual depictions involved mutual, egalitarian depictions, while 72% of the triple-X depictions did so. On the other hand, adult videos had a greater frequency of "solo" activities depicted (eg., sexual entertainment depictions such as stripteases, or nude displays, masturbation) relative to the triple-X videos (34.5% versus 12.9%). The two types of videos were approximately equal in the proportion of sex scenes where participants were in more directive or submissive roles (15.4% of adult sex scenes, 13.7% of triple-X sex scenes), and where the nature of the relationship was unclear (1.6% and 1.3% of sex scenes in adult and triple-X videos, respectively).

Table 4 shows the relative frequency of depiction of various activities for the two types of videos as a percentage of all sex scenes within that video type. There were no differences between the two types of movies on the frequency of occurrence of voyeurism/exhibitionism, or of activities subsumed under "other, deviant" (eg., necrophilia). It was also the case that the three most frequently depicted activities - fondling of breasts or genitals, genital intercourse, and oral-genital contact - were the same in both types of videos, although their rank order differed slightly, and the triple-X videos depicted

Table 4

Frequency of Different Sexual Depictions  
As A Percentage of All Sex Scenes  
Within Adult and Triple-X Videos

Content Category	Adult	Triple-X
Oral-Genital Contact	17.3%	71.7%
Full Nudity	66.9%	69.6%
Partial Nudity	63.4%	66.8%
Fondling Breasts/Genitals	41.0%	63.3%
Genital-Genital Intercourse	27.0%	51.9%
Masturbation	9.9%	27.2%
Voyeurism/Exhibitionism	14.8%	15.7%
Anal Intercourse	0.6%	10.4%
'Hardware' Involved	1.1%	8.5%
'Bought' Sex	1.1%	4.8%
Sexual Entertainment	13.5%	3.7%
Incest	0.2%	3.4%
Still Photo Shown	5.1%	3.0%
Other, Deviant	1.3%	2.0%
Other (eg., Hand-genital manipulation, ejaculation)	5.1%	26.2%

these activities much more frequently. Finally, while depictions of still photos involving sexual activity and sexual entertainment (eg., striptease, nude beauty contests) were



depicted significantly more frequently in the adult videos (chi-squares were 3.99 and 51.99, both  $df=1$ ,  $p<.05$  and  $p<.0001$ , respectively), the triple-X videos depicted all of the following activities with significantly greater frequency: masturbation (chi-square = 70.02,  $df=1$ ,  $p<.0001$ ), fondling of breasts or genitals (chi-square = 76.31,  $df=1$ ,  $p<.0001$ ), oral-genital contact (chi-square = 454.22,  $df=1$ ,  $p<.0001$ ), 'bought' sex (chi-square = 15.06,  $df=1$ ,  $p<.0001$ ), genital intercourse (chi-square = 96.43,  $df=1$ ,  $p<.0001$ ), anal intercourse (chi-square = 58.11,  $df=1$ ,  $p<.0001$ ), the use of 'hardware' (eq., dildos) in sexual depictions (chi-square = 38.32,  $df=1$ ,  $p<.0001$ ), incest (chi-square = 17.84,  $df=1$ ,  $p<.0001$ ), and 'other' (usually hand-genital manipulation, ejaculation, and arousal through 'talking dirty') activities (chi-square = 114.71,  $df=1$ ,  $p<.0001$ ).

#### E. Participants

As one can imagine, a listing of all the various permutations and combinations of numbers of male and female participants of varying ages could run into a very extensive listing. Consequently, efforts will be made here to summarize this information as much as possible by highlighting particular trends in the data. Information will be presented separately first for mutual and solo, and then imbalanced sexual depictions.

First, it should be noted that none of the adult or triple-X movies we coded portrayed pre-pubescent children of either sex in mutual or solo sexual activities. On the other hand, 1% of adult sex scenes and 2% of triple-X sex scenes involved 'apparent' adolescent males (ie., they were portrayed as adolescents and, according to the coder, looked young enough to be questioned about their age in a bar), while 4% of sex scenes in adult videos and 6% of triple-X sex scenes involved 'apparent' adolescent females. By and large, however, most sex scenes involved individuals who portrayed adults and appeared adult (male adults were involved in 47% of adult video sex scenes and 66% of triple-X sex scenes, while female adults appeared in 91% of sex scenes in adult videos 76% of sex scenes in triple-X videos). Thus, while both types of movies tended to favour the presence of females, this favouritism was particularly pronounced in the adult videos.

Solo depictions were featured in 34.5% of sex scenes in the adult videos, and in 12.9% of sex scenes in triple-X videos, although the adult videos were more likely to be portraying 'sexual entertainment' depictions (eg., striptease, nude display) in the context of these scenes, while the triple-X videos were more likely to be portraying nudity accompanied by masturbation. Within both types of videos, however, there was a clear favouritism toward females being the subject of these depictions. Within adult movies, 94.0% of the 151 solo sex scenes we observed featured adult females, while 4.7% featured

adult males, and a further 1.3% involved females who were apparently adolescents. This rank ordering was also true within triple-X videos, where 77.1% of the 109 solo scenes we observed involved adult females, 15.6% involved adult males, and 7.3% involved adolescent females.

A much more complex pattern of permutations and combinations emerged with respect to mutual sexual activity. Certainly the modal depiction in both adult and triple-X movies was the heterosexual, adult couple (41.5% and 47.5% of all mutual sex depictions, respectively). Beyond this, however, the two types of videos diverged somewhat. Within adult videos, heterosexual adult couples were followed in frequency by depictions involving multiple adult females and groups of adult males and females, and the other combinations listed in Table 5. Only five of the mutual sex scenes from the adult videos were not subsumed by any of the combinations listed above. These included 3 scenes involving multiple female adolescents, 1 scene involving a male adolescent with multiple female adolescents, and one scene involving a male adolescent and a female adult.

Within triple-X videos, however, heterosexual adult couple depictions were followed in decreasing order of frequency by those involving single adult males with multiple adult females, multiple adult females, and the other combinations listed in Table 5. It should be noted that 21 out of the 732 mutual triple-X sex depictions we coded were not subsumed under one of the combinations shown in Table 5. These involved various

Table 6

Different Participant Combinations  
as a Percentage of All Mutual Sex Scenes in  
Adult and Triple-X Videos

Participant Combination	Adult	XXX
Heterosexual Adult Couple	41.5%	47.5%
Single Adult Male (M), Multiple Adult Females (F)	13.2%	15.2%
Multiple Adult Females	23.0%	11.9%
Multiple M and F	14.3%	10.9%
Single Adult F, Multiple Adult M	4.5%	5.2%
Multiple Adult Males	0.0%	3.8%
Single Adult M, Single Adolescent F	0.0%	3.7%
Other (see text)	3.5%	2.9%

combinations of all-female or mixed-sex groups in which some or all of the persons were portrayed as adolescents.

As was noted earlier, 15.4% of all sex scenes from adult videos, and 13.7% of such scenes from triple-X videos were considered "imbalanced". This implied that at least one of the participants was portraying a more dominant or directive role than at least one other participant. And while the degree of domination in a given scene occasionally caused us to reflect yet again on the location of the boundary between dominance in a



sexual interaction and dominance that was more legitimately construed as sexual aggression (ie., involving coercion), the 90 imbalanced sex scenes in the adult videos and 138 imbalanced triple-X sex scenes referred to in this section were those which were still perceived by the coders as lying within the domain of sexual activity and, by and large, should be envisaged as scenes in which one or more persons played a more assertive role in directing the course of the interaction.

None of the adult or triple-X videos depicted prepubescent children of either sex in imbalanced sexual depictions. Apparently adolescent individuals were portrayed in dominant roles in 3 scenes of the adult videos (2 involved dominant adolescent females, while 1 involved dominant adolescent males), and in 2 scenes of the triple-X videos (both featured dominant adolescent females). On the other hand, adolescents were portrayed in the more submissive role in 2 adult video scenes (one male, one female), and in 11 triple-X video scenes (10 involved female adolescents, 1 involved a male adolescent). All other scenes involved adults.

Within adult videos, males were the individuals who tended to play the more dominant role (58.6% of these scenes depicted dominant males, 35.6% depicted dominant females, and 5.7% depicted both males and females jointly dominating others). Within triple-X videos, on the other hand, males and females were depicted in the dominant role about equally as often (43.4% of these scenes depicted males dominant, 44.9% depicted females

dominant, and 11.8% featured both sexes jointly dominating others). When the focus was turned to the more submissive individuals in the interaction, however, it was females who typically played this role in both adult and triple-X videos, although the differentiation was more marked in the adult videos. Males were submissive in 22.5% of the imbalanced scenes in adult videos compared to female submissiveness in 71.9% of these scenes, while males and females occupied the submissive role in 37.8% and 57.5% of the imbalanced scenes in triple-X videos. Males and females were jointly dominated by others in 5.6% of the adult imbalanced video scenes and 4.7% of the triple-X imbalanced video scenes.

## 2. Aggression

A scene was said to involve aggression if one or more persons intentionally imposed or attempted to impose hurt, abuse, or force upon one or more other persons, and where this action was not intricately tied to the occurrence of sexual activity. In other words, aggression was perceived as an interpersonal activity that would typically involve at least one perpetrator and at least one victim. On the other hand, we also acknowledged that perpetrator and victim might be one and the same person (ie., self-directed aggression, such as suicide), and that aggression might be portrayed as a mutual process rather than as a unidirectional one (eg., where an argument or

fight spontaneously erupts, or where two individuals or groups are each looking for an argument or fight). Yet the definition also implies what aggression was not. The accidental imposition of hurt, for example, was not considered "aggression", nor did we code aggression directed toward inanimate objects, unless it was done to emphasize threat in the context of interpersonal aggression. Furthermore, aggressive activity which was intricately tied to sexual activity (eg., spanking someone during sexual activity; aggressive arousal turning into sexual arousal; sado-masochism; rape) was not coded as aggression per se, but rather treated separately as sexual aggression (see below). Finally, "aggressive activity" included content which ranged from verbal abuse or threat to physical force, and where the force could range from restraint to murder.

#### A. Frequency and Severity

While sexual activity as a dominant theme was more characteristic of the triple-X videos, aggression was the province of the adult videos, as may be seen in Table 6. Adult videos were found to have a significantly greater absolute number of scenes involving aggression ( $F=17.07$ ,  $df=1,149$ ,  $p<.0001$ ), and a significantly greater proportion of scenes involving aggression relative to the total number of scenes in the movie ( $F=5.59$ ,  $df=1,149$ ,  $p<.02$ ), and relative to the total number of coded scenes ( $F=21.51$ ,  $df=1,149$ ,  $p<.001$ ). In addition

to having more aggression, it was also the case that the aggressive depictions in the adult videos were significantly more severe than those in the triple-X videos ( $F=4.39$ ,  $df=1,149$ ,  $p<.04$ ).<sup>3</sup>

When these indicators were correlated with year of production, we found no indication that the severity of aggressive depictions had changed significantly over time. Further, triple-X videos were remaining relatively constant in the frequency of aggressive depictions and in the proportion of scenes devoted to aggression. The adult videos, on the other hand, showed evidence of a significant decrease in the number of aggressive scenes per movie over time ( $r=-.30$ ,  $p=.02$ ) and in the percentage of codeable scenes devoted to aggression ( $r=-.49$ ,  $p<.001$ ), but a non-significant decrease in the proportion of scenes in the movie as a whole that were devoted to aggression ( $r=-.19$ ,  $p=.17$ ).

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<sup>3</sup> Aggression severity was coded similar to sexual explicitness in the sense that 7-point scales were utilized where the 1, 3, and 5 points were most elaborately defined, and where all other points were defined in terms of those criterion points. A "1" involved activity which was clearly aggressive, but involved no serious injury, was fairly transient in both execution and effect, and was not particularly violent or distressing. A code of "3" was utilized when the aggressive activity was longer in duration, more serious in form and effect, and was clearly in the realm of "assault" or "intimidation". Although weapons might be visible, they would not have been utilized. Finally, a code of "5" implied aggression which, if it were realized, would involve the probable hospitalization or death of the victim. The reader is encouraged to read the coding manual in Appendix A for a more detailed elaboration of the aggression severity coding criteria.



Table 6

A Comparison Between Adult and Triple-X Videos  
on Four Indicators of Aggression

Aggression Indicator	Mean for Adult Videos	Mean for XXX Videos
Number of Scenes Involving Aggression	4.5	1.6
Aggression Scenes as a Percentage of All Scenes	11.0%	6.5%
Aggression Scenes as a Percentage of Coded Scenes	23.6%	9.2%
Rated Severity of Depictions	2.3	1.9

When attention was focussed on the nature of the aggressive depictions, we found some similarities and differences between adult and triple-X videos. Both types of videos tended to treat aggression as an imbalanced process, ie., where there were clear perpetrator and victim roles (74.6% of the aggressive scenes in the adult videos and 79.1% of these scenes in triple-X videos depicted aggression in this way). A smaller number of scenes were depicted as involving mutual aggression (21.6% of adult and 18.6% of triple-X aggressive depictions), and even fewer depicted self-directed aggression (1.5% of adult and 0.8% of triple-X aggressive depictions).

## B. Content

As may be seen in Table 7, the two types of videos were fairly equal in their depictions of verbal aggression, pushing or shoving, confinement, the use of weapons for threat, and brawls. On the other hand, the adult videos contained a significantly greater number of scenes which depicted striking with a fist or kicking ( $\chi^2 = 4.23, p < .05$ ), severe beatings or fights ( $\chi^2 = 5.13, p < .05$ ), torture or dismemberment ( $\chi^2 = 5.34, p < .02$ ), attempted murder or successful murder ( $\chi^2 = 3.73, p < .05$ ), and in the actual utilization of weapons in aggressive encounters ( $\chi^2 = 8.27, p < .005$ ).

## C. Participants

Finally, our attention turned to the participants in aggressive interactions. In the sexual domain, the modal interaction was a mutual one, and the modal participants were the heterosexual adult couple. In contrast, within the aggressive domain, the modal interaction was a unidirectional/imbalanced one, with a clear differentiation of perpetrator and victim roles. It was also the case that the modal interaction was male versus male, although this was primarily the case in imbalanced depictions. In the less frequent instances of mutual aggression, it was the male and

Table 7

Frequency of Different Aggression Depictions  
as a Percentage of all Aggression Scenes  
Within Adult and Triple-X Videos

Content Category	Adult	Triple-X
Verbal aggression, threat	63.6%	62.8%
Pushing, Shoving	36.0%	37.2%
Strike With Fist, Kick	34.8%	24.0%
Weapon Utilized	32.2%	17.8%
Weapon Used for Threat	26.5%	21.7%
Attempted/Actual Murder	24.6%	15.5%
Confinement, Kidnapping	17.8%	11.6%
Severe Beating, Fight	12.5%	4.7%
Torture/Dismemberment	8.0%	1.6%
Brawl	4.9%	3.1%

female adult who appeared most frequently as adversaries.

Self-directed aggression was extremely infrequent. Of the 264 scenes in the adult videos which depicted aggression, only 3 involved self-inflicted aggression; two of these involved adult males, while one involved an adult female. A total of 129 triple-X scenes depicted aggression. In only one of these scenes was the aggression self-directed; the participant was an adult female.

Mutual aggression was depicted in 56 different scenes in the adult videos we observed, and in 22 different scenes in the triple-X videos. Among both types of videos, the participants in these interactions were most frequently an adult male and female; this was the case in 25.0% of the aggressive depictions in adult videos, and in 36.4% of the triple-X video scenes involving mutual aggression. Following this, one saw (in decreasing order of frequency) the involvement of multiple males (in 21.4% of adult and 27.3% of triple-X depictions of mutual aggression), groups of multiple males and females (19.6% of adult video and 9.1% of triple-X depictions), multiple females (12.5% and 9.1% of adult and triple-X depictions, respectively), and a variety of isolated other combinations. Most of the mutual aggression we observed was verbal, although male-female aggression included an occasional slap across the face while male-male aggression frequently involved fights.

As was noted previously, aggression was mostly unidirectional, with a clear distinction between perpetrator and victim roles. Single adult males were the most frequent perpetrators in both the adult and triple-X videos (in 44.7% of adult video and 38.4% of triple-X video unidirectional aggressive depictions), as well as the most frequent victims (in 42.5% and 45.2% of the adult and triple-X depictions, respectively). Single adult females were next most frequent in these roles. Adult videos portrayed females as perpetrators in 24.4% of the unidirectional imbalanced depictions, and as



victims 31.5% of the time. For triple-X videos, these figures were 35.6% and 28.8%, respectively. Following this, in decreasing order of frequency, one saw mixed-sex adult groups, multiple adult males, multiple adult females, and then adolescents of both sexes in both roles in both types of videos.

### 3. Sexual Aggression

In order to be coded for content involving "sexual aggression", a scene had to intricately tie these two domains (sex and aggression) together, ie., sexual arousal had to be achieved in part through aggressive/coercive means, and/or aggressive activity had to occur with and be tied to a sexual context.

#### A. Frequency

As was the case with aggression, sexual aggression was also the province of the adult videos. In all comparisons (see Table 8), adult films were found to have more sexually aggressive content, although the strength of the effect depends on which indicator one chooses. Adult movies were found to have a significantly greater absolute number of depictions of sexual aggression per movie than did triple-X videos ( $F=11.4$ ,  $df=1,149$ ,  $p<.001$ ). On the other hand, the difference between the two types of videos only approached statistical significance when one

Table 8

A Comparison Between Adult and Triple-X Videos  
on Three Indicators of Sexual Aggression

Indicator of Sexual Aggression	Mean for Adult Videos	Mean for Triple-X
Number of scenes involving Sexual Aggression	2.6	1.2
Sexual Aggression Scenes as a Percentage of All Scenes	6.6%	6.4%
Sexual Aggression Scenes as a percentage of Coded Scenes Only	15.4%	11.7%

compared the relative proportion of codeable scenes per movie which involved sexually aggressive depictions ( $F=3.39$ ,  $df=1,149$ ,  $p=.06$ ), and was clearly non-significant when one compared the proportion of scenes involving sexual aggression relative to the total number of scenes in the movie ( $F<1.0$ ,  $df=1,149$ ,  $p=n.s.$ ).

While the results above revealed that, overall, less sexual aggression was found in triple-X videos than in the adult ones, the temporal analyses also indicated that this gap seems to have been widening over time. When we correlated year of production with the three indicators of sexually aggressive content, we found that, in triple-X videos, the number of sexually aggressive scenes, the proportion of sexually aggressive scenes relative to the number of codeable scenes, and the proportion of

scenes involving sexual aggression relative to the total number of scenes in the movie, had all decreased significantly ( $r$ 's were  $-.29$ ,  $-.28$ , and  $-.29$ , respectively; all  $p$ 's  $< .02$ ). This was not the case within the adult videos, however, where the amount of decrease in sexually aggressive content was non-significant on all three indicators.

## B. Content

The frequency of different types of sexually aggressive activity for the two types of videos, expressed as a proportion of sexually aggressive scenes within that video type, may be seen in Table 9. (Recall that the adult videos included 155 scenes that involved sexual aggression, while there were 111 scenes of this type in the triple-X videos). The rank ordering of frequency of the different acts was quite similar in the two types of movies, although there were occasional differences in absolute frequency. The most frequent activity depicted involved the use of verbal abuse, humiliation and/or threat for stimulation. This was observed significantly more frequently in the adult videos than in the triple-X videos ( $\chi^2 = 8.22$ ,  $df=1$ ,  $p < .005$ ), although it was quite pervasive in both groups. Sexual activity involving bondage or confinement were next most frequently observed in both types of videos, followed by the practice of being rough in otherwise normal sexual activity; the inclusion of spanking, hitting, slapping or pulling hair in

Table 9

Frequency of Different Sexually Aggressive  
Depictions as a Percentage of All Sexually  
Aggressive Scenes Within Adult and Triple-X Videos

Content Category	Adult	Triple-X
Verbal Anger, Humiliation	77.4%	60.4%
Bondage, Confinement	45.8%	37.8%
Being Rough in Otherwise Normal Activity	25.2%	33.3%
Slap/Hit/Spank/Pull Hair	23.2%	33.3%
Rape	21.9%	30.6%
Sexual Harassment	18.1%	17.1%
Coercion With Weapons	16.8%	10.8%
Mud Wrestling, etc.	6.5%	0.0%
Sado-Masochism	3.9%	13.5%
Sexual Mutilation	3.2%	2.7%

sexual activity; and rape. In none of these latter four activities did the two types of videos differ significantly in the relative frequency of their occurrence within sexually aggressive depictions. There were significant differences on two lower frequency activities, however: triple-X videos showed sado-masochistic activity significantly more frequently than did the adult videos (chi-square = 7.00,  $df=1$ ,  $p<.01$ ), while the adult videos more frequently depicted activities such as mud



wrestling ( $\chi^2 = 5.76$ ,  $df=1$ ,  $p<.03$ ).

When we turned our attention to the nature of these sexually aggressive depictions, we found that this domain shared more similarities with our aggression data than the sexual data. In particular, sexual aggression tended to be depicted more frequently as a unidirectional act involving clear perpetrator and victim or dominant and submissive roles, than as a mutual act (87.7% and 79.7% of the adult and triple-X video depictions of sexual aggression, respectively, were coded as 'unidirectional'). Nonetheless, 7.1% of the adult video and 19.8% of the triple-X depictions involved mutual sexual aggression. Finally, 2.6% of the adult depictions involved self-administered sexual aggression, while none of the triple-X depictions did so.

### C. Participants

Within "mutual" sexual aggression scenes, the adult videos most frequently depicted multiple females as participants (in 5 of 15 scenes), followed in frequency by a single male and female adult (4 scenes) and groups of multiple male and female adults (3 scenes). No adolescents or children of either sex were involved. Within the triple-X videos, the majority of scenes (9 out of 15) involved a male and female adult, while 2 scenes were devoted to each of (a) multiple female adults; (b) multiple male and female adults; and (c) a male adult and a female adolescent.

The unidirectional scenes painted a clear picture of men as perpetrators and females as victims of sexual aggression. Within the adult videos, 79 (or 58.5%) of the depictions featured single males as perpetrators, while a further 15 (or 11.1%) featured multiple males. The corresponding figures within triple-X videos were 42 (or 43.8%) and 15 (15.5%). On the victim side, adult videos portrayed single and multiple females in victim roles in 99 and 7 (or 73.3% and 5.2%) of the scenes, while the same figures for triple-X videos were 66 and 5 scenes (or 69.5% and 5.3% of the depictions). Other combinations were substantially less evident. Occasionally roles were reversed. Adult videos portrayed females as the aggressors in 31 (or 23.0%) of the scenes, and males as victims in 17 (or 12.6%) of the scenes. In triple-X videos, the corresponding figures were 23 (or 24.0%) and 16 (or 16.8%). Most other scenes portrayed mixed-sex groups of adults in both perpetrator and victim roles. The notable exception is that 8 scenes in the adult videos, and 5 scenes in the triple-X videos, portrayed female adolescents in victim roles. No children were involved in any of the sexually aggressive scenes.

#### 4. Some General Themes

The analysis above presented a scene by scene analysis of the 150 videos we coded. But several other issues, more thematic in nature and hence not conducive to scene by scene coding,

needed to be addressed. When coders completed each movie, they were asked to express their judgements regarding a number of different themes. We must admit the questionable reliability of these impressionistic judgements, but feel they may help to focus discussion and highlight a number of issues which pervade this area of research.

With respect to sexual activity, coders were first asked to indicate whether the video they had just seen had portrayed any negative consequences to participants as a function of their involvement in sexual activity. Such situations do, after all, sometimes occur in everyday life: people feel guilty, they have unwanted pregnancies, they contract sexually transmitted diseases, they come to regret their involvements, and so forth. In fact, the coders noted that negative consequences did occur in 47 (or 31.3%) of the movies, usually in the way of imposing new difficulties or complexities in the participant's life as a function of a new interpersonal involvement. There was a significant association between movie type and the answer to this question, with the triple-X movies being significantly less likely to portray such negative consequences ( $\chi^2 = 5.23$ ,  $df=1$ ,  $p=.02$ ).

In the aggression domain, two questions were included. The first asked whether the video had depicted aggressive perpetrators in positive fashion, eg., as a hero or heroine, or as an otherwise 'good' person. For the 103 videos for which the question was relevant and which the coder answered a clear yes

or no, the answer was 'yes' on 62 occasions (ie., approximately 60% of time). The second question asked whether aggressive perpetrators ever received negative consequences for their actions, eg., were charges laid against them, or did they receive some form of 'just desserts'? On the 100 occasions on which this question was relevant and answered unambiguously, the answer was 'no' 73 times.

Finally, in the domain of sexual aggression, coders were asked whether they felt the video they watched had in some way reaffirmed or encouraged 'rape myths', eg., the idea that even though a woman says 'no' to a prospective sexual involvement, she really means 'yes'; or that once a male imposes himself upon a woman, she will ultimately come to enjoy the experience; or that women who get raped in some sense 'deserved' that experience. The coders answered 'yes' on 36 occasions (for 16, or 28% of the adult videos, and for 20, or 22%, of the triple-X videos). Although the proportion of 'yes' judgements was greater among adult videos, there were no significant differences between the adult and triple-X videos in the frequency of such perceived endorsement.\*

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\*It should be noted that the 'relevance' of this question to the coded video was not purely a function of the presence of sexual aggression, or of rape depictions in particular. There were several instances where none of these depictions had occurred, but, because of the nature of the sexual depictions involved, the coders expressed the view that rape myths were in some sense reaffirmed.



#### IV. Summary

The primary objective of this research project was to systematically assess the content of sexually explicit videos with respect to the prevalence and nature of depictions involving sex, aggression, and sexual aggression. While the focus was in large part intended to be on the 'pornographic' video industry and the content/nature of its sexual depictions, the distinction was made between this "under the counter" triple-X material and the more socially acceptable adult material that sits openly on the shelves awaiting your consumption.

In comparing the two types of videos, one finding was not particularly surprising, ie., that triple-X videos had a significantly greater proportion of sexual content, and significantly more graphic/explicit sexual content, than the adult videos. This is, after all, the primary criterion upon which the single-X/triple-X distinction is made, and hence may be seen as more a validation of the coding scheme than a significant empirical revelation. Instead, the surprises emerged when comparisons were made in the realms of aggression and sexual aggression. In contrast to the claims one reads and hears about the violence and sexual violence that exists in "pornography", and despite the fact that a significant proportion of the triple-X movies were sampled in an effort to

find the 'worst' pornography available in this area, we found that it was the adult material, available in your local video outlet, that included this material significantly more frequently, and depicted the aggression with significantly greater severity.

We found that if one wanted to rent a triple-X video, then one's surest bet would be to enter a sex-specialist outlet, where anywhere from 700 to more than 1000 triple-X titles would be available. These would undoubtedly bear the label of the outlet chain, and would in all probability be a locally produced copy of a tape which was originally purchased in the United States. On the other hand, there is also a good chance that a triple-X tape could be acquired at one's local general purpose video outlet, by merely taking out a membership and asking for the triple-X list. This was the case in all the community areas we sampled except the west side of Vancouver (area 2), where only one of the outlets had triple-X tapes available. If one did follow this latter route, the choice would be more limited (generally to between 20 and 100 tapes), but the tape so acquired would nonetheless have a high probability of bearing the label of one of the two major distributors who run most of the sex specialist outlets and keep most of the general purpose outlets stocked in sexually explicit tapes.

And what would you see if you rented one of these triple-X tapes? Table 10 lists the 10 content categories, across all three content domains (sex, aggression, and sexual aggression),

that we observed most frequently in the 92 triple-X videos we coded. Note that all 10 entries are from the "Sex" content domain. In all probability, the scenes would feature heterosexual adult couples, adult females only, and/or adult group sex depictions in which everyone was portrayed as having a good time. The primary purpose behind the plot, if there were one, would be to provide opportunities to show different people engaging in different sexual activities in as many positions as possible.

If, on the other hand, you chose to rent an "adult" or "single-X" tape from your local video outlet, your viewing and renting experience would be somewhat different. First of all, you would be viewing an authorized copy of a tape that had cleared customs, and which bore the label of its original American distributor. Your video would probably be one of two major 'generic' types. The first is often referred to as the "T&A" variety, where you watch participants, usually female participants, in various stages of undress. Or you may be exposed to actual sexual activity, generally heterosexual, although the degree of explicitness will be limited. The second major type of "adult" video would be more of a "film" in the sense of including potentially significant efforts at plot development, and its sexual component might be more tangential to or integral to the dominant theme of the video.

The ten content categories we observed most frequently in the 59 adult videos we coded are listed in decreasing order of

Table 10

The Ten Most Frequently Observed Content  
Categories in Triple-X Videos

Domain	Content Category	Number of Depictions
Sex	Oral-Genital Sex	715
Sex	Full Nudity	694
Sex	Partial Nudity	666
Sex	Fondling of Breasts/Genitals	631
Sex	Genital-Genital Intercourse	517
Sex	Masturbation	271
Sex	Hand-genital Manipulation, Ejaculation, "Talking Dirty"	261
Sex	Voyeurism/Exhibitionism	157
Sex	Anal Intercourse	104
Sex	Use of 'Hardware' (eq., dildos)	85

frequency in Table 11. Note that in contrast to the ubiquity of sex in the triple-X videos, the adult videos were more likely to include sex, aggression, and sexual aggression. Along with the sexual categories of nudity, fondling, and intercourse, we also see verbal abuse and/or threat in the context of both aggression and sexual aggression, as well as assaultive activities such as pushing, shoving, striking and kicking. And, as was noted earlier, the sexual activity is significantly less explicit, and



Table 11

The Ten Content Categories Most Frequently  
Observed in Adult Videos

Domain	Content Category	Number of Depictions
Sex	Full Nudity	421
Sex	Partial Nudity	399
Sex	Fondling of Breasts/Genitals	258
Sex	Genital-Genital Intercourse	170
Agg	Verbal Aggression/Abuse/Threat	168
SexAgg	Verbal Abuse/Humiliation/Threat	120
Sex	Oral-Genital Sex	109
Agg	Pushing/Shoving	95
Sex	Voyeurism/Exhibitionism	93
Agg	Strike With Fist/Kick	92

the aggressive activity significantly more severe, than in the triple-X videos.

These tables are a reaffirmation of the more detailed results presented in Chapter 3. They suggest that if one wants to see sex, then the triple-X videos are the place to look -- one will see lots of it, and it will be depicted very graphically. But if one wants to see aggression and sexual aggression, then one is better off looking on the shelves of the

local video outlet than in looking "under the counter". The irony of the situation is difficult to overlook. It was perhaps nowhere best demonstrated than in a video outlet we visited on the West Side of Vancouver. In response to the 'usual' question of whether the outlet had triple-X materials available, the proprietor answered, somewhat indignantly, that "We don't have much call for that type of material in this area". Yet a cursory glance across his shelves revealed numerous titles which we knew contained depictions of persons, usually females, being raped, tortured, and mutilated. You don't see the breast being kissed or fondled as a part of more graphic sexual activity, you just get a quick glimpse of it when the woman is in the shower, and then another while she is being butchered. It is a curious statement of how "acceptable" depictions of violence are in our culture.

There are many ways in which the results of our research should be placed in some perspective. First of all, one should realize that our focus in this research was on videos which had "sex" as a common theme, and our results make only a partial statement of what one is exposed to in adult and triple-X videos where sexual activity is the primary focus. Our observations during the course of this study suggest that there are other film genres that warrant similar scrutiny with violence and sexual violence as the focus, all of which enter the country legally and sit innocuously on the shelves. One genre which obviously merits some attention is the "horror" film, which

varies from the tension of Hitchcock to the blatant sex and gore butchery of more contemporary offerings. A second is the "martial arts" or "vengeance" film which shows the utility and satisfaction of violence and revenge. A third is the "war" film that shows how you, too, can gain respect through zealous nationalism and the efficient, large-scale imposition of death.

A second caveat to be noted here is that one's results are inevitably limited by the measuring instrument one imposes. In other words, while the content coding scheme developed for this research focussed on what were perceived as crucial aspects of preliminary importance, there are many elements which were not addressed by the coding scheme, and hence, were not coded. We did not, for example, address in any direct way the role of humour in the depictions we assessed, nor was there a way to code the discomfort of observing a rape scene with a pleasant muzak soundtrack playing in the background, nor could we really distinguish between a serious depiction and parody, nor did we attempt to deal with dimensions like "objectification" or "degradation". In sum, while we feel our research has much to offer, one must also acknowledge its limitations.

And finally, it should also be noted that even in the more violent (overall) adult videos, aggression and sexual aggression were relatively infrequent. But while this infrequency was in a sense pleasing to discover, these results should not be interpreted as suggesting that no further attention is warranted within either type of movie. It is gratifying to know, in other

words, that "only" 6% of the scenes depicted sexual aggression, yet this should not undermine the attention that those 6% of scenes should receive.



## V. Concluding Comments

The 'pornography issue' has changed considerably since 1970 when the U.S. Commission on Obscenity and Pornography released its report and gave 'pornography' a relatively clean bill of health. At that time, pornography was defined on the basis of explicit sexuality, and the issue of determining whether some material was 'merely' pornographic, or should be considered 'obscene', rest on the point of whether the material in question was in some sense more graphic than community standards would tolerate. Contemporary legislation, in both the U.S. and Canada, is in large part a reflection of that definition. Beginning in the mid-1970's, however, numerous (primarily feminist) authors (eg., Brownmiller, 1975; Morgan, 1975) began directing attention away from the issue of sexual explicitness per se, and toward a concern over the nature of these depictions, particularly in terms of their violent and coercive content. The distinction made by these authors was not one of pornography versus obscenity, but rather of pornography versus erotica, where the latter referred to material which was sexual in content, but which portrayed sexual relations in more egalitarian and loving fashion. Pornography, on the other hand, changed from being a categorical word which merely denoted explicit sexual content, and became by definition pejorative, since it implied violence, coercion, and imbalanced depictions of social relationships. And

there is no doubt that this proposed shift in definition has had an impact, as attendance at the hearings of the Special Committee and a recent study by Palys, Olver & Banks (1984) would attest.

Yet, changing the meaning of a word that has been used in a given way for at least 200 years (eq., see Wilson, 1973) has both advantageous and unfortunate consequences. Its primary advantage is that it has helped focus our societal attention on the very important issues of violence and sexual violence and, in particular, on our relative tolerance of material in these domains. But its disadvantages are several. First, it has produced societal conflict in which ostensibly competing camps of opinion have argued about two incredibly different types of material, each of which is known in its respective camp as "pornography". And second it is unfortunately true that even when words come to change their meaning, they seem inevitably to bring along extra baggage from their earlier incarnation.

This would seem to be the case within the 'pornography' domain, at least within the context of our research in the area of video 'pornography'. While societal concern has shifted to a focus on the issues of violence and sexual violence, the place we have looked for this 'pornographic' material is in the realm of sexually explicit material, perhaps because that is where we have 'always' looked for 'pornographic' material in the past. But as the present study has revealed, we may be looking in the wrong place. When we focus on "sex-specialist" video outlets and

on sexually explicit material, what we find is largely sexually explicit material -- incredibly graphic, often somewhat tasteless a celebration of a "sex is fun" mentality, but little else. While violence and sexual violence were indeed discovered, the analyses revealed not only that this material has apparently decreased in frequency, but that if indeed our priorities are in the realm of violence and sexual violence, then our attention would be better directed at what is on the shelves rather than at the material "under the counter". If, on the other hand, sex per se is our concern, then triple-X is obviously the place to look.

But while our findings are relatively clear-cut, they beg the question of "why?" they were obtained. In other words, what factors might account for the results that were observed? It was noted in the introduction to this report that the video industry represents a relatively free market at this point in time, since videos do not currently fall under film censor board control. We also expressed the feeling that the safest assumption to make was that any type of material could probably be acquired if one had enough time, money, and resources to acquire them. But if this is true, if even the most despicable depictions of violence and sexual violence are available, then why did these materials not appear more frequently in the video outlets we sampled?

Part of the answer undoubtedly appears in the data we have already reported, where there were indications that the sexually explicit video industry itself has changed over the years. While

they are still in the business of producing material showing graphic sexual depictions, these videos were found to be including more scenes, more non-coded (ie., plot development) scenes, and, in many ways were becoming more like "movies" than "skin flicks". One gets the impression that a different market is being pursued -- less the young bucks at the stag party who relish the consumption of objectified femininity, but more the young or middle-aged couple who obtain arousal value from watching a sometimes humorous, always graphic portrayal in the privacy of their own home.

Our interviews with the proprietors of Greater Vancouver video outlets provided some support for this notion. When asked to identify their clientele for triple-X videos, the proprietors indicated that most were in the 25 to 45 year age range, and that the largest consumers were couples (who would typically rent one or two videos "over the counter" for family consumption, and one "under the counter" for their own viewing), and single males. Single females are apparently infrequent consumers.

Another part of the answer, however, would appear to lie in the interaction between the proprietors and the context in which they operate. The proprietors we interviewed were homogeneous in the sense that each was an entrepreneur who wanted to succeed financially in his or her chosen domain, ie., owning a video rental establishment. Each of the persons with whom we spoke was also in the position of determining what videos would be made



available in that outlet. What determined their choices? Several factors might be cited: (1) the legal environment in which they operate, ie., the prospect that they might be charged with distributing obscene materials; (2) the social environment in which they operate, ie., the prospect that they might incur demonstrations, protests, or complaints about the material they made available; (3) their own personal values, ie., their desire to maintain a reasonable self-image in renting materials whose existence they would be prepared to defend; and (4) the demands of the market, ie., their knowledge or belief that if one is to succeed, then one must have that which their clients desire.

Of all these factors, the least effective, in a direct sense, was the existing legislative provisions regarding obscenity. More than half the proprietors we interviewed did not even know what these provisions were, and of those who indicated they did, most were not entirely clear on how they might apply the legal definition of obscenity to the material available to them. Several also commented on the apparent capriciousness of the application of these provisions, eg., when a movie with a person being whipped was declared obscene (and, they acknowledged, reasonably so), but where their shelves are allowed to contain dozens of films (eg., in the 'horror' section) where women are killed, dismembered and mutilated in depictions far more graphic and brutal than anything which exists in triple-X. On the other hand, it should be noted that most of the proprietors we interviewed commented positively on

the idea of legislation, and viewed it as a formal expression of societal guidelines. They merely expected a clearer assertion of the location of the boundaries, and/or some centralization of responsibility with respect to classification.

But while our interviews were clear in indicating that legal provisions were quite ineffective in a direct sense for the proprietors of general purpose outlets who chose to make sexually explicit material available, they may be seen as more effective in an indirect way in determining the range of materials which are made available on the broader rental market. As was noted, many of the video proprietors did not even know what the obscenity provisions of the Criminal Code were, let alone how to interpret them. On the other hand, those who operate the sex specialist outlets do seem aware of these provisions, and, although they, too, have argued over their ambiguity, these operators seem to be quite responsive to deleting titles and/or offending scenes when violations or alleged violations are brought to their attention. Given that those who established the sex specialist outlets are, in general, also the primary distributors of sexually explicit material to the general purpose outlets, then one can see that the ripples which emerge from attention to the source ultimately has an impact on the broader market. Yet there is an unfortunate paradox in that while it is the sex specialist outlets who are subjected to the greatest scrutiny, it is often the general purpose outlets which stock the most questionable material. This

is because many of the general purpose proprietors have 'old' stock to which they pay little attention, and hence may well have titles on hand which, since they were acquired, had been declared obscene.

Notwithstanding these legal considerations, our interviews indicated that the other three factors were more directly influential in determining video rental offerings in general purpose establishments. Proprietors, and even the many proprietors who (astonishingly) knew little about films and rarely even watched them themselves, typically provided general dicta to distributors indicating that while they wished to receive 20 titles of a certain type of film, they did not wish to receive videos containing X,Y, or Z, where X,Y, and Z have been determined by (1) their own personal values; and (2) the demands of the market, within the context of (3) the social environment in which they operate.

Our data revealed that triple-X material was relatively more innocuous than adult material in terms of violence and sexual violence. But was that because of "real" differences in the nature of such materials, or because of the intense scrutiny under which such materials have been placed? One can never know for certain, and it was at that point that we had to confront the limitations of our own research. While our data revealed a representative picture of 'now' in the video rental industry, our temporal analysis was constrained by the inevitable limitations of a cross-sectional research design. Our

understanding of both this industry and social process would be greatly enhanced if studies like the one reported here were to be replicated in future years and, in that way, to monitor social change. In sum, one would hope that this piece of research will not remain the study of video pornography, but rather be just the first in a longitudinal design.

Notwithstanding these limitations, one lesson we have learned is that the influence of the social environment on video content and video rental practices should not be minimized. It was clear that many video proprietors did not acquire certain kinds of materials because they did not wish to incur the wrath of some very vocal and effective protesters. Those individuals have been very effective in sensitizing proprietors and their clients to issues involving violence and sexual violence within the context of sexually explicit materials, and have demonstrated the power that censure can have, even in the absence of restrictive censorship.



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## APPENDIX "A"

Video Coding Manual & Coding Sheets

# CONTENT ANALYSIS OF VIDEOS

You've Seen the Movie.

Now Read...

The Manual

Prepared by:

T. S. Palys, Ph.D.

with

Gloria Baker-Palys

Susan Bluck

Deborah Landy

John N. Oliver



## Overview

The coding of any given video involves three types of coding sheets. First, a COVER SHEET will be completed for the video. This includes general information about the video, its source, and the coder. Information about the video itself (title, production information) can be obtained from the video outlet from which the video was rented, the video's packaging, the credits at the beginning of the video, and/or "trade" magazines we will endeavour to procure. Cross-check this information across sources whenever possible, and note any inconsistencies that arise, including the sources of the conflicting information.

The coder then begins viewing the video. The basic unit of analysis for coding will be THE SCENE, which is defined as "an uninterrupted sequence of activity which occurs in a given physical context". The opening credits do not count as a scene, although the credits may be superimposed on a scene, in which case the scene would indeed be coded. Otherwise, the first scene would commence after the credits are completed. Appropriate SCENE CODING SHEETS are completed for each scene in which sex, aggression, and/or sexual aggression are considered present. Scenes which do not include any of these three types of content are tabulated, but not coded. Detailed information about how and when to use each SCENE CODING SHEET is given below.

Upon completion of a given video, the coder will fill out an OVERALL REVIEW SHEET which asks for general summary and

impressionistic or evaluative information about the video.

In sum, a complete video coding will include the completion of one COVER SHEET, as many SCENE CODING SHEETS as there are codeable scenes in the video (appended in sequence), and one OVERALL REVIEW SHEET at the back of the package.

## THE COVER SHEET

1. Coder. Put the first initial of your first name in this space (ie., Susan=S, John=J, etc.).
2. Movie Number. Each movie will be assigned a movie number. Enter it if you know it; otherwise leave blank.
3. Date. Indicate the date the coding was completed, in the order of year, month, day of month, using numbers in all cases.
4. Name of Video. This title should appear both on the packaging and at the beginning of the movie. Note this in full in the space provided. Please print legibly, using block capital letters.
5. Tape Status. Does the tape appear to be a "pirate" copy, or does it appear to be an original? Originals will probably have a production company sticker on the top side that may also show a photo from the video, video title, and/or production information. They will probably also have serial numbers of some sort printed on the ends of the front edge of the casing. Both types will have the title of the video on the front edge (ie., an uninformative attribute). It's doubtful that you will receive the original box in either case, so this, too, is an uninformative attribute.
6. Date of Production. This is an important element since it will allow the testing of hypotheses concerning changes in video content over time. Check packaging information and opening credits for this information, and note any

inconsistencies. If this information is not available through either of these sources, point this out when submitting the completed coding forms, as a more exhaustive search will have to be undertaken. Only the year of production is required.

7. Location of Production. This refers to the location of the production company, NOT the location in which the movie was shot. Once again, scan the packaging and credits for this information, note inconsistencies, and draw missing information to Ted or John's attention. In the event that production location is unavailable, be certain to at least note the production company in the "Comment" item at the bottom of the COVER SHEET, as locational information may be facilitated through this information. Note further that there are two ways for you to respond to this item (given that locational information is available), and you should do both: (1) Write the location, being as specific as possible, in the space provided; but also (2) enter a location code. The location code is three digits long. The first digit is the COUNTRY code, where 1 = Canada and 2 = United States; codes for other countries are listed in the appendix. The second and third digits of the location code are for the province or state of origin. See the province/state code list in the appendix. Finally, note that while there is no place for CITY in the location code, you would nonetheless note this information in writing in the space provided, if



it were available.

8. Video Outlet Code. Each video outlet from which videos are secured will be given a code number, and this number should be entered here by the person who secured the video. The first digit will represent the area in which the video outlet is located. Areas and codes are as follows: (1) Eastern Suburbs, including New Westminster, Port Coquitlam, Port Moody, and Coquitlam; (2) East Side Vancouver, bounded by Main Street to the West, Boundary Road to the East, Hastings Avenue to the North, Kingsway to the Southwest, and King Edward to the South; (3) West Side Vancouver, including Kitsilano and Kerrisdale north of King Edward Avenue; and (4) The West End of Vancouver, bounded by Denman Avenue to the West, Georgia Avenue to the North, Burrard Street to the East, and Pacific Street to the South. Within each area, the person who is primarily responsible for acquiring tapes from that area will compile a list of outlets dealing in "Adult" and/or "Triple-X" material. List them as you find them, in sequential, numerical order with double-digit codes beginning at 01. Keep these codes in a safe place, ie., don't lose them. The two digit code you provide will constitute the second and third digits of the video outlet code. These codes will only be distributed on a "need to know" basis, and should be treated as **CONFIDENTIAL**, ie., you should not discuss sources with ANYONE not connected to the study.

9. Type of Outlet. This, too, should be noted by the person who secures the video. A "sex specialist" shop is one which deals primarily in sexually explicit films, while a "general purpose" outlet is one which deals in a broad selection of titles, of which a minor proportion are sexually explicit.
10. Type of Video Operation. At the point where you discuss memberships with the proprietor or clerk at the outlet, ask whether they are related organizationally to any other outlets (eg., "Is my membership card 'good' anywhere else?"). Note whether the outlet is (1) an independently owned operation not related to any other outlets; (2) one of a small chain with perhaps a few other outlets in the Lower Mainland Area or elsewhere in B.C.; (3) part of a national chain with outlets in other provinces in Canada; (4) part of an international organization, with outlets also in the United States. If you are unable to determine this information, use code "5".
11. Declared Classification. This will be completed by the person who secured the video. Typically, sexually explicit films will be designated as "adult" or "Triple-X", although they may be innocuously listed and displayed with other movies (code 3), or given some other label (code 4; note label in space provided).
12. Location of Video in Outlet. Where in the outlet was the video located? Note code "1" if the video was out on the shelves, visible to all, and not in any way demarcated as

"different" from other stock. If videos are partitioned by movie type (eg., drama, comedy) and the video you secure is set aside as "Adult" or "Triple-X" or any other title implying sexual explicitness, but still readily visible on the shelves, you would note code "2". Note that the crucial variable differentiating codes "1" and "2" is not sectioning per se, but whether the adult or Triple-X video you get is clearly noted as such (ie., a code '2') or whether it is just buried among other titles (code '1'). Code '3' implies that the listing from which you chose the video was not visible to all those who entered the shop, but, rather, required an "extra step" to secure, eg., asking for a list and/or being required to take out a membership before being given access to the list and/or being allowed to rent adult or triple-X movies. The next code (4) implies that more extensive efforts were required than those listed in category (3), ie., even the average patron who was looking for a movie of this type would have had difficulty securing it. If none of codes "1" through "4" apply, then check code "5" and explain the situation.

13. Comments. Any comments about the video and/or the outlet from which it was rented may be noted here. For example, some of the movies we viewed during the pretest period included formal editorial comment about freedom of choice; these comments would be noted here. Any other production and distribution information of interest should be written here

as well. For example, (1) Is there any special "credit" information, eg., that the video contains "true" or "fictitious" events?; (2) Are there any disclaimers about the willing participation of persons in the video?; (3) Is there any attempt to put forth the idea that the film is a documentary, intended for educational purposes, or whatever?



## SCENE CODING SHEETS

As noted earlier, the basic unit of analysis for video coding is the "scene", which is defined as "an uninterrupted sequence of activity which occurs in a given physical context". Thus, shifts in physical context will generally imply changes in scene, although there will be occasional exceptions to this. For example, a scene may show two people going for a walk and having an extended conversation. In the process of having the conversation, they may walk through several different physical locations. Yet, as long as the continuity for the scene came from the conversation, and as long as entry in to the different physical contexts did not shift the focus of action or interrupt the conversation, then you would consider this to be one extended scene. It should also be noted that even if physical location does not change, there may be scene changes nonetheless. For example, if the nature of the focal activity shifts dramatically, or if new participants enter the scene and a significant change in the action occurs because of their entry, then a new scene would be coded.

One thing to watch for is the editorially interrupted (rather than thematically interrupted) scene. Let's say that there are three separate events which occur concurrently. The editor or director of the film has a choice in how to portray this. One alternative is to first show one scene, then the next, and then the last. Each scene would thus be thematically whole,

and you would have coded three scenes. A second alternative, however, would involve intertwining the scenes in such a way as to give the impression of concurrence. This might be done by showing a glimpse of scene one, a glimpse of scene two, a glimpse of scene three, back to scene one again, back to scene two again, and so forth through (possibly) several iterations. Given an overly rigid adherence to our earlier definition of "scene", you might feel compelled to do a new coding sheet with each change from scene to scene; this is problematic from at least three perspectives: (1) an inordinately large number of scene coding sheets will be completed; (2) a given thematic scene will end up being coded several times over (ie., once each time a scene 'glimpse' is depicted); and (3) it distorts what is going on. Consequently, you should attempt to recognize editorially interrupted scenes and code them as a unitary whole on the coding sheets (ie., in the example above, you should end up with only three coded scenes). Of course, all other rules for scene changes still apply, eg., if there is a dramatic change in action and/or personnel and/or context, etc.

In coding the scene, you are asked to note whether sexual activity, aggressive activity, and/or sexually aggressive activity are occurring. The definitions for each of these are delineated in their respective sections below. If none of these three activity types is occurring, then the scene is still tabulated (ie., consider it a scene and give it a scene number) but not coded (ie., do not fill out a SCENE CODING SHEET for

it). If at least one of these types of activity is present, then you fill out whichever SCENE CODING SHEETS are relevant to that scene. Normally, a given scene will only include one of the three types of activity, in which case you would fill out only one type of coding sheet. On the other hand, more than one would be coded if (a) there is a clear mix of activity in the scene, eg., the participants engage in various discrete activities, some of which are in one category and some in another; or (b) the scene contains parallel activities, some of which are in one category and some of which are in another, eg., sexual activity in the foreground with aggressive activity of other participants in the background.

Note that coders should not feel they must code in "real" time, ie., feel free to use freeze-frame, fast forward or rewind, and forward or reverse visual search in order to maximize coding accuracy and efficiency.

Note also that one of the things you are asked for on every type of coding sheet is the "scene number". This refers to the number of the scene within the movie you are coding. Recall that scenes will be coded only IF they involve at least one of sex, aggression, or sexual aggression. You should, however, keep track of the number of non-coded scenes, as you will need this information when you get to the OVERALL REVIEW SHEET. While scenes which do NOT involve one of the dimensions noted above will not be coded, you should nonetheless acknowledge their existence in the scene numbers. For example, let's say scene

number one is a non-coded scene, scene two is sexually explicit, scene three is a non-codeable one, and scene four involves both aggression and sex. In this example, only two scenes would be coded, since only two of the scenes involve sex, aggression, and/or sexual aggression. Despite the fact that scene two is the first scene to be coded, it would nonetheless be listed as Scene 02; this would imply that Scene one was considered non-codeable. Similarly, scene 04 would be listed as such, despite the fact that it would only have been the second scene to be coded. And finally, note that for scene 02, the only coding sheet to be filled out would be a SEX sheet, while both a SEX sheet and an AGGRESSION sheet would be completed for scene 04.

A last noteworthy point is that at the top of each of the SCENE CODING SHEETS is a row of seven boxes. These boxes are where you are to insert the Seven\_Digit\_Magic\_Number\_Code (SDMNC). The SDMNC is both 7 digits and quite magical. The seven digits are (1) Coder initial; (2 to 4) Movie number; (5 and 6) Scene number; and (7) Card type. The card type code is '2' for AGGRESSION, '3' for SEX, and '4' for SEXUAL AGGRESSION. The magic comes in that inclusion of this code plays a major role in helping me to analyze all of this. Now let's look at each of the individual SCENE CODING SHEETS in turn.

#### AGGRESSION

(ie., Independent of Sex).



Note first of all that this section refers to aggression or violence per se, ie., aggression that is not intricately tied to sexual activity. If you witness aggression which is a part of sexual activity, then you would code it as sexual aggression in a later section of this coding sheet. Note also that aggression in this context refers to interpersonal aggression; violence directed toward inanimate objects or other non-persons is not counted (unless it is done in the context of interpersonal violence, eg., to emphasize threat). Also, you may wish to comment on any non-interpersonal violence you witness in your comments in this section. Note further that "aggression" is said to occur whenever one or more persons intentionally imposes or attempts to impose hurt, abuse, or force upon one or more other persons.

3. Aggression\_\_Severity\_\_Code. Is there any aggression, as defined above, in the scene? If not, then do not complete an AGGRESSION sheet for the scene. If there is aggression in the scene, however, then you would begin by rating the scene in terms of the severity of violence involved. Three main levels of violence are recognized: (1) minimal (coded as a "1"); (2) moderate (coded as a "3"); and (3) severe (coded as a "5").

The aggression would be considered "minimal" (and coded as a "1") if the act was clearly aggressive but involved no serious injury to the recipient(s), was fairly transient in both execution and effect, and/or was not particularly

violent. Examples might include grabbing someone and shaking them a bit, a single slap across the face, a non-sexual spanking of short duration and which resulted in no more than pink cheeks, verbal abuse, a bit of pushing and shoving, and so forth.

The next (moderate) level, coded as a "3", is starting to be rather serious. There is a clear intent to inflict hurt, or to induce threat through a combination of verbal abuse, confinement/restriction and/or available weaponry. Examples would be fist fights, slapping someone around at length, throwing someone on or against a solid object, kicking, imposing cuts or wounds, or threatening with weapons. In other words, we're in to the realm of rather clear assault and intimidation here. Weapons may be visible, but would not have been utilized.

Finally, the third (severe) level of aggression (coded as a "5") implies a strong intent to injure which, if successful, would involve probable hospitalization or death of the victim. Weapons may or may not be involved. Examples would include severe beatings, shootings, maiming, torture, throwing off a cliff, running over with a car, and so forth.

If you witness aggression of the types described above, they will normally be coded "1", "3", or "5". Note, however, that within each of the three levels, you may choose to rate the scene 1 point higher or lower than "normal", if and only if there are mitigating or aggravating aspects to the scene

that lead you to believe a deviation from the "normal" code for that level is warranted. This should not be a frequent practice, however, and should only be done if you feel the choice of the 'usual' 1/3/5 codes would distort the nature of the depicted activity, which you felt was in some sense qualitatively different from the 'usual' activities of that type. In other words, be reluctant to use discretionary points, but don't be afraid to use them.

Examples of mitigating factors that would warrant giving one point less than the code for a given level (ie., 0 instead of 1; 2 instead of 3; 4 instead of 5) might be that the aggression is of brief duration, or that the action (while clear as to its nature) occurs off-screen, or is done comedically or only half-seriously, or that, because of the acting, the violence does not have the air of "reality" to it that would warrant the higher, normal rating. Aggravating factors that would warrant giving one point more than would normally be coded (ie., 2 instead of 1; 4 instead of 3; 6 instead of 5) would be if the violence was of lengthy duration, was depicted quite graphically, and/or had a definite air of "reality" and immediacy to it.

Finally, it may be noted that very rarely, the rating of "7" might be considered appropriate. This rating would only be used if the violence were so severe and the depiction so graphic that you were truly amazed and felt ill due to the violence involved.

4. Aggression Initiation. Some aggressive scenes will depict two or more individuals who both/all contribute to the initiation of the event, eg., a fight spontaneously erupts or where both enter the scene looking for a fight. If this is the case, insert code "1" (AGGRESSION MUTUALLY INITIATED) and then proceed to item 4a. In other instances, however, one (or more) persons will initiate an aggressive act against another person(s). If there is a clear distinction between perpetrator(s) and prospective victim(s), then insert code "2" (AGGRESSION UNIDIRECTIONALLY INITIATED) in the box and then proceed to item 4b. Note, incidentally, that the coding in this item refers to how the aggression is initiated, and not on the eventual outcome. Thus, if a person starts a fight with another person, and the second person fights back in defense, then this would nonetheless still constitute aggression that was unidirectionally initiated because the one person started it.

Furthermore, there may be some instances in which a person directs aggression toward themselves, such as in self-mutilation or suicide. In this case, you should insert code "3" (AGGRESSION SELF-DIRECTED) and then proceed to item 4a.

Finally, it may be unclear who initiated the aggressive activity, eg., when the action is already in process as the scene begins. If this is the case, insert code "4" in item 4, but do not bother to code participants in items 4a or 4b,



ie., proceed directly to item 5. Note also that "initiation" should only be coded once for any given scene. That is, once you've coded initiation for a given sequence of activity, don't keep on coding it on subsequent coding sheets that refer back to the same initiation. From that point on, just code "4" for unclear/in progress.

a. Aggression Participants: Mutual or Self-Directed Initiation. If the aggression you witnessed was mutual or self-directed, then you will want to now code the attributes of the participant(s). Six cells are presented in a 3x2 matrix. Indicate the number of persons of each type "involved" in that scene. Ignore persons who are "incidentals" in the scene. With respect to the gender variable, note the apparent sex of the person(s) involved, eg., if males were dressed and portrayed as females, they would be coded as "female". As for the age variable, do your best to code for "apparent" age, ie., the way the person is portrayed in the film. "Child" implies pre-pubescence; "adolescent" implies post-pubescent but probably a teenager -- could this person, as portrayed, legally get a drink in a bar?; "adult" implies all persons not included in the first two categories. Remember that you are coding the number of each type of person in each of the six cells of the matrix. Finally, use only single-digit numbers in each cell, ie., only code up to nine persons in any

given cell of the matrix; if there are more than nine, you would just insert a "9" in the appropriate cell.

- b. Aggression Participants: Unidirectional Initiation. If the aggression you witnessed was unidirectionally initiated, then you will now want to code the age and gender attributes of both the initiator(s) and the recipient(s) of the initial aggressive act(s). In each case, you are given a 3x2 matrix like that described in the preceding section, and your task is to code the number of each type of person in each of the six cells of the two matrices (up to 9 per cell).
5. Aggression in Process. The preceding item asked you to address the question of how the aggressive interaction got started. Now you are asked to address the question of whether, overall, you felt the aggressive interaction was a mutual, balanced involvement, or whether there was a clear differentiation between perpetrator(s) and victim(s). If the aggressive interaction was a mutual involvement among willing participants, then insert code "1" (mutual) in the box, even though one or more person(s) may have emerged as the eventual "winner(s)" of the interaction. Interactions in which 'perpetrator' and 'victim' roles exist, but switch back and forth, are to be coded as "mutual". If, on the other hand, the interaction was an apparently imbalanced interaction with one person/group clearly and consistently dominating the other, such that there are clear perpetrator

and victim roles, then insert code "2" (unidirectional). Finally, if the aggression is self-directed, note code "3" or, if none of the codes above apply, insert code "4" and explain. If you noted mutual (code 1) or self-directed (code 3), proceed to item 5a. If you noted unidirectional (code 2), proceed to item 5b. If you coded code 4 (other), then move on to item 6.

a. Participants: Mutual or Self-Directed Aggression. Note the number of each type of participant(s) in each cell of the 3x2 matrix, just as you did in item 4a.

b. Participants: Unidirectional Aggression. If there is a clear division between perpetrator and victim in this interaction, then note the number of each type of person in the appropriate cells of the respective matrices.

6. Aggression Content Codes. A number of different aggressive acts are listed under this item. Put a "1" in all boxes where that activity is present; put a "0" (zero) if the activity was not included in the scene. In the event that some important act you witness is missing from the list, then note "other" and specify the nature of the activity. In general, the listing should be self-explanatory. I'll mention only two here. First, activities like pushing off a cliff and any other activity where the object was to kill someone will be included under the "attempted murder, death" code (item 7), regardless of whether the attempt was successful or not. Second, "weapon" (in items 7 and 8) will

include not only "traditional" weapons like guns and knives, but also items used as weapons, eg., baseball bats, candle holders, and other 'blunt instruments'.

### SEXUAL ACTIVITY

(ie., independent of aggression)

Note that this refers to explicit sexual activity per se, ie., sexual activity that does not involve any element of deception, coercion, or aggression. If any of these elements are part of the sexual activity, then it would be coded below under "Sexual Aggression" (see item 12). Two further points are worthy of note here: First, the mere fact that one or the other person(s) tends to dominate or direct the nature of the sexual activity will not in and of itself lead to the coding of the relationship as coercive (ie., sexual aggression), although you will probably want to note these attributes in your open-ended comments for this section. In other words, as long as all participants are apparently entering the scene willingly, then the scene will be coded as purely sexual even though some element of dominance/submission is involved. On the other hand, if the aggression is overt (eg., in sado-masochism), it will be coded as sexual aggression even though the participants enter willingly.



A second point to be made here concerns the definition of "sexual activity". A scene will be considered "sexual" if (any of) the focal participant(s) in the scene is/are (a) wearing any less clothing than one might wear on a public beach; or (b) is involved in any lascivious action, even if fully clothed, that would be noticeable and deemed inappropriate in a dimly lit, but public, bar.

7. Sexual Explicitness Code. If the activity in the scene is not "sexual" as defined above, then you would not complete a SEX coding sheet. If the activity is sexual per se (ie., it meets either of the above criteria and occurs in the absence of aggressive or coercive activity), then you would begin by rating the scene in terms of its sexual explicitness. Three levels of sexual explicitness are recognized: (1) minimal (coded as a "1"); (2) moderate (coded as a "3"); and (3) maximal (coded as a "5"). Your task is to determine the level of sexual explicitness in the scene, ie., which would normally involve the coding of a 1, 3, or 5. A discretionary allowance of plus or minus one point is allowed, as in the aggression severity codes. Note, finally, that in the event that various sexual activities are depicted, you would normally code for the level of the most explicit of these activities, although the nature of other activities may possibly influence your decision to use discretionary points.

A code of "1" (minimal sexual explicitness) would be appropriate where full or partial nudity is depicted, or the scene involves fondling of breasts, buttocks or genitals through clothing, striptease, "talking dirty", massage where the apparent object is titillation rather than relaxation, still photos of sexual activity, or "vague images" of explicit sequences (eg., shadows on the wall; ambiguous action in a steamy shower; dark lighting making action ambiguous).

A "moderate" level of sexual explicitness (coded 3), on the other hand, would be coded if an activity like sexual intercourse or oral genital contact were depicted and you, given your viewing position, were unable to tell whether the action was "real" or "simulated". (An example would be a scene in which a woman was depicted administering fellatio to a male. He is standing, she is on her knees, and the camera angle is from behind the woman's head. Although oral genital contact is an intimate sexual activity, and it appears this is what is occurring in the scene, you can't tell for certain whether this is the case because of the camera angle.) A "3" would also be coded if fondling/caressing or other 'foreplay' were occurring while nude, but not accompanied by any other activities designed to facilitate ejaculation or which involved penetration. In sum, code 3 refers to explicit foreplay activities or implicit intercourse or oral-genital or oral-anal

activities.

Finally, a code of "5" (extremely or maximally explicit) would be warranted if the activity were an extremely intimate one (ie., involving contact between one person's genitalia and another's genitalia, mouth, hands, or with 'hardware') and if the depiction indicated quite clearly what was occurring, ie., the hypothesis of 'simulation' is untenable. Continuing with the fellatio example from the previous paragraph, a code of "5" would be warranted if the camera were relatively close to the characters (ie., giving a feeling of involvement rather than mere observing), the camera shot was from the side, and one witnessed the man's penis entering the woman's mouth. Other examples would include stimulation designed specifically for ejaculation of the male or of the orgasm of the female, where both the activity and its result were graphically depicted; or close-up depiction of any penetration activity, whether vaginal or anal and whether by hand, penis, or accessory.

A few general points should also be noted. First, the above scheme assumes that there is nothing inherently more or less sexually explicit about masturbation, heterosexual acts, or homosexual acts per se. Further, it is possible to utilize discretionary points to code a given scene as one point more or less sexually explicit than "normal" in the event that the presence of mitigating or aggravating factors

leads you to feel that the depiction is more or less explicit than the prototypical member of that class. Mitigating factors might include the presence of greater ambiguity than usual about the nature of the activity, or where the portrayal is of relatively short duration. Aggravating factors that would warrant giving an "extra" point might be portrayals of long duration, the compounding of several simultaneous acts, and/or the addition of such graphic indicators as spurting semen or the breaking of taboos (eq., incest, necrophilia) in addition to the activity per se.

Finally, as was the case with the "Aggression" coding, it is possible you may come across a scene that is so incredibly graphic and explicit that you find it hard to believe. If this is the case, a code of "7" may be utilized.

8. Sexual Initiation. Did the participants enter the scene willingly? Does an egalitarian relationship prevail in the initiation of the scene? If so, then the scene will be considered "mutually initiated" and you should insert code "1" in the box and proceed to item 8a. Or, did one or more person(s) take the initiative in the interaction? If so, then the scene is said to be "unidirectionally initiated", and you should insert code "2" in the box and proceed to item 8b. In the event you feel that the interaction was unidirectionally initiated, then you should, of course, be able to specify who initiated it and who was drawn in to the



activity.

Four further points should be made. First, note that "taking the initiative" here is still defined within the range of "normal" interaction patterns; if the power differential during initiation is unduly severe and/or if overt aggression is present, then you should be coding the activity as sexual aggression, not sex per se. Second, note that if only one person is portrayed (ie., a masturbatory activity is depicted), then you would insert code "3" and proceed to item 8a. Third, if the initiation roles are unclear (eg., the scene begins with the activity already in progress), then insert code "4" and proceed to item 9. Fourth, any given sexual sequence should only be coded for initiation once. Any subsequent sexual activity which stems from the same initiation should thenceforth just be coded "4" (unclear/in progress).

a. Sexual Initiation: Mutual or Solo. A 3x2 matrix is depicted which concatenates apparent age and gender of participants. You should note the number of each type of participant in the appropriate cell of the matrix (up to nine per cell). See the analagous section under "Aggression" for further information.

b. Sexual Initiation: Unidirectional. Assuming you've chosen this alternative, then it should be clear who took the initiative here and who was drawn in to the interaction. Two 3x2 matrices are depicted, one for the

initiator(s), and another for the submissive one(s).

Note the number of each participant type in the appropriate cells of the respective matrices.

9. Sexual Activity in Process. Forget about how the activity was initiated. Look at the action in process. Does the interaction as a whole appear mutual and egalitarian? If so, insert code "1" and answer item 9a. Or were there 'dominant' and 'submissive' roles involved? eg., does one person play a greater role in directing the activity?; is one person more 'in charge' of the situation?; is one person more passive than another? If there are dominant and submissive roles involved, but these roles switch back and forth, consider the interaction 'mutual' and proceed as above. But if the dominant and submissive roles stay relatively constant, then consider the interaction 'imbalanced', insert code "2", and proceed to item 9b. If only one person is involved, then insert code "3" (solo activity) and proceed to item 9a, or if the roles fall in to none of the above categories, insert code "4", explain, and proceed to item 10.

- a. Sexual Activity: Mutual or Solo Participants. If the sexual activity was mutual or solo, code the apparent gender and age of participants in the matrix, indicating the number of each type. If you forgot how to do this, follow instructions for items 4a, 4b, 5a and 5b mutatis mutandis.
- b. Sexual Activity: Imbalanced. If there were consistent

dominant and submissive roles undertaken by participants, then you should be able to identify the individuals in the respective roles. Do so by indicating the numbers of each type of participant in the appropriate cells of the respective matrices.

10. Affect. You're being asked to make a fairly qualitative judgement in this item, regarding the presence, absence, and valence of affect in the scene. Positive depictions refer to scenes in which the activity is depicted as enjoyable for both/all participants. A super-positive depiction is indicated when both/all participants are depicted as not only having enjoyed themselves, but where at least two of the following indicators are present: (1) you have the impression that participants are there for more than 'just sex'; (2) the participants cuddle or otherwise show affection to one another above and beyond stimulation in the sexual activity itself, either (3) physically (eg., by hugging, kissing, caressing); or (4) verbally (eg., by professing love, affection, consideration). A negative depiction is indicated whenever at least one of the participants exhibits fear, guilt, insecurity, jealousy, frustration, and/or being 'turned off' or disgusted by the activity. A super-negative depiction is when both/all participants seem to feel this way. Finally, the neutral/mechanical alternative implies scenes in which the sexual activity seems emotionless, uninvolving, shallow,

neither positive nor negative, and/or participants seem merely to be going through the motions. Read these descriptions carefully, and then follow your intuitions about this one. If you can't decide which applies, then code "neutral".

11. Sexual\_\_Content\_Code. Listed are a number of activities. Put a "1" in the appropriate space if the activity was depicted in this scene; put a "0" (zero) in the space if the activity was not depicted. In the event some important act that was depicted is not included in the list, then check either "other, deviant" if the activity involves a deviant activity like urination, defecation, necrophilia, etc., or simply "other" if it is another, relatively "normal" activity.

#### SEXUAL\_AGGRESSION

(ie., Sex and Aggression intricately tied together).

In order to be considered "sexual aggression", the activity depicted in the scene must obviously mix sexual activity (as defined above) with actual or threatened aggression, coercion, or deception. Sexual aggression thus involves the use of force and/or an attempt to hurt, in the context of sexual activity. Sex and aggression must be intricately entwined. Note, however, that you are first asked to rate the degree of sexual explicitness and aggression severity of the scene separately.



For "sexual aggression", the ratings of both sexual explicitness and aggression severity will necessarily both be greater than zero. If only one is greater than zero, then you're in the wrong category. If both are zero, then you shouldn't be coding sexual aggression at all.

12. Sexual Explicitness Code. Rate the sexual explicitness of the activity per se, using the same coding scheme you utilized in item 7 above (ie., sexual explicitness per se). Recall that three levels of sexual explicitness are recognized (minimal, moderate, and maximal; coded 1, 3, and 5, respectively), discretionary points are possible, and a "7" may be utilized for extreme instances.
13. Aggression Severity Code. Rate aggression severity per se using the same coding scheme you utilized in item 3 above (ie., aggression severity per se). Recall that three levels of aggression severity are recognized (minimal, moderate and severe; coded 1, 3, and 5, respectively), discretionary points are possible, and a "7" may be utilized in extreme instances.
14. Sexual Aggression Initiation. Was the sexually aggressive interaction mutually initiated? ie., did both/all participants enter in to the sexually aggressive activity of their own accord? Or did some/one of the participants unidirectionally initiate the sexual aggression? Or was the sexual aggression directed toward self? Insert the appropriate code, and proceed to item 14a if mutual or

self-directed, or to item 14b if unidirectional. If the initiation was unclear, or already coded in a previous "sexual aggression" coding sheet, then insert code "4" and proceed to item 15.

a. Sexual Aggression Initiation: Mutual or Solo. Indicate the gender and apparent age of participants in the sexually aggressive interaction by putting the number of each type in the appropriate space (up to 9 per cell).

b. Sexual Aggression Initiation: Unidirectional. If the sexual aggression was unidirectionally initiated, then there will be both an initiator or perpetrator(s) and recipient or victim(s). Note the number of each type in each role in the appropriate cells of the respective matrices (up to 9 per cell).

15. Sexual Aggression in Process. Forget about the initiation at this point. Look at the sexual aggression in progress. Is the activity mutual, imbalanced (involving dominant and submissive roles), self-directed, or ambiguous/none of the above? Code the appropriate alternative (see item 9 if you'd like definitions), and proceed to item 15a if mutual or self-directed, to item 15b if imbalanced, and to item 16 if ambiguous/none of the above.

a. Sexual Aggression Participants: Mutual or Self-Directed. Code the number and type of participants in the matrix, as you have done before.

b. Sexual Aggression Participants: Imbalanced. Code the

number and type of participants in each role in each matrix as you have done before.

16. Sexual Aggression Content Codes. A number of sexually aggressive activities are listed. Code a "1" for those present in the scene, and a "0" (zero) for those that were not. Specify any "other" important activities you see that are not on the list, on your "others".

## OVERALL REVIEW SHEET

1. Coder/Movie. You should begin by noting both the coder's first initial and the three digit movie number, to ensure continuity and as a precaution for inadvertant shuffling.
2. Scene Tally. Enter the total number of scenes, ie., coded and non-coded scenes, in the space for item 2a. In section (b), you should note the total number of non-coded scenes only, ie., the total number of scenes which did not involve at least one of sex, aggression, or sexual aggression. Finally, in sections (c), (d) and (e), you should note the total number of scenes in which sex, aggression, and sexual aggression were coded, respectively. Note that the total of  $a+b+c+d$  will not necessarily add up to the total number of scenes in (a), since scenes could have been coded on more than one dimension.
3. Overall Potpourri. Listed are a number of questions (3 to 10) which ask you to make some subjective judgements about the video you just watched. These are opinion items and should be seen as no more, no less. Place a "1" in the space beside each item if you think "yes" to the item, place a "2" if you think "no", place a "3" if you are undecided or uncertain, and place a "4" if the question is irrelevant to the video (eg., it asks about aggression and there was no aggression in the video). Finally, note that in question 10, the word "message" should be interpreted liberally as a set



of conclusions one might come to about sexuality (and/or other dimensions) if the director's and scriptwriter's words were heeded. What does this video "say" about sex? About relationships? There may not be a message, but, if there is, spit it out in about 25 words or less.

## SCENE SUMMARY SHEET

The purpose of the SCENE SUMMARY SHEET is both to help you keep an inventory of scene numbers as well as to end up with a fairly comprehensive summary of the video. SCENE NUMBERS (along the left) should thus commence at 01 and be incremented by 1 each time. In the four columns under CODING, you should insert a check mark or "X" to indicate the dimension(s) on which the scene was coded (or check "NO" if the scene was non-codeable). This will make it easier for you to do your scene tally figures on the OVERALL REVIEW SHEET. And finally, a BRIEF SYNOPSIS (ie., description of the scene in one or two sentences) should, overall, give the reader a good 'feel' for the content and flow of the movie.

PROVINCE/STATE CODES FOR  
COVER SHEET ITEM 7

---

CODE	PROVINCE/STATE
01	California
02	New York
03	Michigan
04	Illinois
05	British Columbia
06	Ontario
07	Quebec
08	Nevada
09	Ohio

---

COUNTRY CODES FOR  
COVER SHEET ITEM 7

---

CODE	COUNTRY
1	Canada
2	United States
3	Sweden
4	England
5	Italy
6	France
7	Germany

---



# VIDEO CODING/COVER SHEET

1. CODER  (Col.1)

2. MOVIE NUMBER       (Cols.2-7)

3. DATE (YY/MM/DD)       (Cols.8-13)

4. VIDEO TITLE \_\_\_\_\_

5. TAPE STATUS ☐ 1. ORIGINAL  
Col.4 { ☐ 2. PIRATE  
{ ☐ 3. CAN'T TELL

6. DATE OF PRODUCTION: 19   (Cols.15-16)

7. LOCATION OF PRODUCTION COMPANY:    (Cols.17-19)

8. VIDEO OUTLET CODE:    (Cols.20-22)

9. TYPE OF OUTLET: Col.23 { ☐ 1. SEX SPECIALIST  
{ ☐ 2. GENERAL PURPOSE

10. TYPE OF OPERATION Col.24 { ☐ 1. INDEPENDENT  
{ ☐ 2. LOCAL CHAIN  
{ ☐ 3. NATIONAL CHAIN  
{ ☐ 4. INTERNATIONAL CHAIN  
{ ☐ 5. UNKNOWN

12. DECLARED CLASSIFICATION: Col.25 { ☐ 1. ADULT  
{ ☐ 2. TRIPLE-X  
{ ☐ 3. UNCLASSIFIED  
{ ☐ 4. OTHER (SPECIFY) \_\_\_\_\_

13. LOCATION OF VIDEO IN OUTLET Col.24 { ☐ 1. Part of general stock  
{ ☐ 2. Separate from general stock, but still clearly visible on shelves  
{ ☐ 3. 'Special' access required  
{ ☐ 4. Extensive effort required  
{ ☐ 5. Other (please specify) \_\_\_\_\_

14. COMMENTS(eg., regarding video, production info, or outlet).  
leave col.27 blank

SDMNC:

						2
--	--	--	--	--	--	---

AGGRESSION

(Cols. 28-34) (leave Col.35 blank)

3. AGGRESSION SEVERITY  (Col.36)4. AGGRESSION INITIATION  (Col.37)(1=mutual; 2=unidirection;  
3=self; 4=unclear/in progress)

4a/MUTUAL/SELF

OR

4b/UNIDIRECTIONAL

	M	F	
ADULT	(Col.38)	(Col.41)	ADULT
ADOL	(Col.39)	(Col.42)	ADOL
CHILD	(Col.40)	(Col.43)	CHILD

(i) INITIATOR(S)		(ii) RECIPIENT(S)	
M	F	M	F
(Col.44)	(Col.47)	ADULT	(Col.50) (Col.53)
(Col.45)	(Col.48)	ADOL	(Col.51) (Col.54)
(Col.46)	(Col.49)	CHILD	(Col.52) (Col.55)

5. AGGRESSION IN PROCESS  (Col.56)

(1=mutual; 2=imbalanced; 3=self-directed; 4=unclear)

5a/MUTUAL/SELF

OR

5b/IMBALANCED

	M	F	
ADULT	(Col.57)	(Col.60)	ADULT
ADOL	(Col.58)	(Col.61)	ADOL
CHILD	(Col.59)	(Col.62)	CHILD

(i) PERPETRATOR(S)		(ii) VICTIM(S)	
M	F	M	F
(Col.63)	(Col.66)	ADULT	(Col.69) (Col.72)
(Col.64)	(Col.67)	ADOL	(Col.70) (Col.73)
(Col.65)	(Col.68)	CHILD	(Col.71) (Col.74)

(leave column 75 blank)

6. AGGRESSION CONTENT:

☐ 1. verbal aggression  
humiliation, threat  
(Col.76)

☐ 2. pushing,  
shoving  
(Col.77)

☐ 3. striking with fist,  
kicking  
(Col.78)

☐ 4. severe beating,  
fight  
(Col.79)

☐ 5. confinement,  
(Col.80)

☐ 6. torture  
dismember  
(Col.81)

☐ 7. attempted  
murder, death  
(Col.82)

☐ 8. weapons  
for threat  
(Col.83)

☐ 9. weapons  
utilized  
(Col.84)

☐ 10. brawl  
(Col.85)

☐ 11. other  
(Col.86)

☐ 12. other  
(Col.87)

☐ 13. other  
(Col.88)

☐ 14. other  
(Col.89)

☐ 15. other  
(Col.90)

SDMNC:

						3
--	--	--	--	--	--	---

(Cols. 28-34)

SEX
-----

7. SEXUAL EXPLICITNESS ☐ (Col. 35)  
(leave column 36 blank)

8. SEXUAL INITIATION ☐ (Col. 37) (1=mutual; 2=unidirectional; 3=self-directed, 4=unclear/in progress)

8a/MUTUAL/SELF

OR

8b/UNIDIRECTIONAL

		M F		(i) INITIATOR(S) M F		(ii) SUBMISSIVE(S) M F		
ADULT	(Col. 38)	(Col. 41)	ADULT	(Col. 44)	(Col. 47)	ADULT	(Col. 50)	(Col. 53)
ADOL	(Col. 39)	(Col. 42)	ADOL	(Col. 45)	(Col. 48)	ADOL	(Col. 51)	(Col. 54)
CHILD	(Col. 40)	(Col. 43)	CHILD	(Col. 46)	(Col. 49)	CHILD	(Col. 52)	(Col. 55)

9. SEX IN PROCESS ☐ (Col. 56) (1=mutual; 2=imbalanced; 3=solo; 4=unclear)

9a/MUTUAL/SOLO

OR

9b/IMBALANCED

		M F		(i) DOMINANT M F		(ii) SUBMISSIVE M F		
ADULT	(Col. 57)	(Col. 60)	ADULT	(Col. 63)	(Col. 66)	ADULT	(Col. 69)	(Col. 72)
ADOL	(Col. 58)	(Col. 61)	ADOL	(Col. 64)	(Col. 67)	ADOL	(Col. 70)	(Col. 73)
CHILD	(Col. 59)	(Col. 62)	CHILD	(Col. 65)	(Col. 68)	CHILD	(Col. 71)	(Col. 74)

10. AFFECT OF DEPICTION ☐ (Col. 75) (1=super-positive; 2=positive; 3=neutral/mechanical; 4=negative; 5=super-negative).

11. SEXUAL CONTENT CODES:

(Col. 76) <input type="checkbox"/> 1. Partial nude display	(Col. 81) <input type="checkbox"/> 6. Oral-genital contact
(Col. 77) <input type="checkbox"/> 2. Full nude display	(Col. 82) <input type="checkbox"/> 7. 'Bought' sex
(Col. 78) <input type="checkbox"/> 3. Masturbation	(Col. 83) <input type="checkbox"/> 8. Genital-genital
(Col. 79) <input type="checkbox"/> 4. Voyeurism/ Exhibitionism	(Col. 84) <input type="checkbox"/> 9. Anal sex
(Col. 80) <input type="checkbox"/> 5. Fondling of breasts, genitals	(Col. 85) <input type="checkbox"/> 10. 'Hardware'

(Col. 86) <input type="checkbox"/> 11. still photo shown
(Col. 87) <input type="checkbox"/> 12. Sexual Entertainment (eg., striptease)
(Col. 88) <input type="checkbox"/> 13. Incest
(Col. 89) <input type="checkbox"/> 14. other, deviant
(Col. 90) <input type="checkbox"/> 15. Other

SDMHC:

						4
--	--	--	--	--	--	---

Cols.28-34

SEXUAL AGGRESSION

12. SEXUAL EXPLICITNESS CODE  (Col.35)13. AGGRESSION SEVERITY CODE  (Col.36)
 14. SEXUAL AGGRESSION INITIATION  (Col.37) 1=mutual; 2=undirectional;  
 3=self-directed;  
 4=unclear/in progress

14a/MUTUAL/SELF

M F

ADULT	(Col.38)	(Col.41)	ADULT
ADOL	(Col.39)	(Col.42)	ADOL
CHILD	(Col.40)	(Col.43)	CHILD

OR

14b/UNDIRECTIONAL

(i) INITIATOR(S)

(ii) RECIPIENT(S)

M F

M F

(Col.44)	(Col.47)	ADULT	(Col.50)	(Col.53)
(Col.45)	(Col.48)	ADOL	(Col.51)	(Col.54)
(Col.46)	(Col.49)	CHILD	(Col.52)	(Col.55)

 15. SEXUAL AGGRESSION IN PROGRESS  (Col.56) (1=mutual; 2=imbalanced;  
 3=self-directed; 4=unclear).

15a/MUTUAL/SELF OR

15b/IMBALANCED

(i) PERPETRATOR

(ii) SUBMIT/VICTIM

M F

M F

M F

ADULT	(Col.57)	(Col.60)	ADULT	(Col.63)	(Col.66)	ADULT	(Col.69)	(Col.72)
ADOL	(Col.58)	(Col.61)	ADOL	(Col.64)	(Col.67)	ADOL	(Col.70)	(Col.73)
CHILD	(Col.59)	(Col.62)	CHILD	(Col.65)	(Col.68)	CHILD	(Col.71)	(Col.74)

(leave column 75 blank)

16. SEXUAL AGGRESSION CONTENT CODES:

- |   |  |   |
|---|--|---|
| Col.76 <input type="checkbox"/> 1. Verbal anger, abuse, humiliation, threat.        | <input type="checkbox"/> 6. Bondage, confinement<br>(Col.81)                           | <input type="checkbox"/> 11. other(specify)<br>(Col.86) |
| Col.77 <input type="checkbox"/> 2. Sexual harassment                                | <input type="checkbox"/> 7. Sexual mutilation<br>(Col.82)                              | <input type="checkbox"/> 12. other(specify)<br>(Col.87) |
| Col.78 <input type="checkbox"/> 3. Slapping/hitting/ spanking/hair-pulling          | <input type="checkbox"/> 8. Coercion with weapons for stimulation<br>(Col.83)          | <input type="checkbox"/> 13. other(specify)<br>(Col.88) |
| Col.79 <input type="checkbox"/> 4. sado-masochism                                   | <input type="checkbox"/> 9. Being rough in otherwise usual sexual activity<br>(Col.84) | <input type="checkbox"/> 14. other(specify)<br>(Col.89) |
| Col.80 <input type="checkbox"/> 5. Mud-wrestling or such, depicted as entertainment | <input type="checkbox"/> 10. Rape<br>(Col.85)  | <input type="checkbox"/> 15. other(specify)<br>(Col.90) |



(leave column 91 blank)

OVERALL REVIEW SHEET

1. CODER/MOVIE 

				0	0	5
--	--	--	--	---	---	---

 (Cols. 92-98)

2. INDICATE

(a) 

--	--

 total number of scenes in movie  
(Cols. 99-100)

(b) 

--	--

 number of non-coded scenes  
(Cols. 101-102)

(c) 

--	--

 number of SEX scenes  
(Cols. 103-104)

(d) 

--	--

 number of AGGRESSION scenes  
(Cols. 105-106)

(e) 

--	--

 number of SEXUAL AGGRESSION  
(Cols. 107-108)

3. 

--

 Were there any negative consequences to any participants as a function of their sexual involvements (eg., herpes, unwanted pregnancy, guilt, death)?  
(Col. 109)

4. 

--

 Overall, would you say that aggressive perpetrators were depicted positively in this video? ie. the hero/ine is aggressive, aggressive acts portrayed as acceptance parts of encounters.  
(Col. 110)

5. 

--

 Were there any negative consequences depicted for perpetrators of aggressive activity in this video (eg., just desserts, charges laid, guilt)?  
(Col. 111)

6. 

--

 If you knew someone who was looking for 'good' pornography, would you recommend this video to them?  
(Col. 112)

7. 

--

 Were there any efforts in this video to be "educational" in terms of explicit efforts to endorse particular sexual lifestyles? ie. editorial comments pertaining to appropriate ways of leading one's sexual life?  
(Col. 113)

8. 

--

 Were there any efforts in this video to be "educational" about specific sexual practices?  
(Col. 114)

9. 

--

 Do you feel that the sexually aggressive depictions in this video reaffirm or endorse acceptance of "rape myths".  
(Col. 115)

10. 

--

 Is there a "message" to this film? What is it?  
(Col. 116)

## APPENDIX "B"

### List of Coded Videos

## List of Video Titles

-----  
Video Title.....Classification  
-----

A Girls Best Friend .....Triple-X  
A Little More Than Love .....Triple-X  
A Scent of Heather .....Triple-X  
Afternoon Delights .....Triple-X  
Alice in Wonderland .....Triple-X  
Autumn Born .....Adult...  
Babyface .....Triple-X  
Bad Girls .....Adult...  
Bad Girls 2 .....Triple-X  
Barbara Broadcast .....Triple-X  
Beauty .....Triple-X  
Best of Sex and Violence, The .....Adult...  
Big Bird Cage .....Adult...  
Black Emmanuelle .....Adult...  
Blonde Next Door, The .....Triple-X  
Brief Affair .....Adult...  
Budding of Brie, The .....Triple-X  
California Valley Girls .....Triple-X  
Caligula .....Adult...

Centrefold Fever .....Triple-X  
 Champagne for Breakfast .....Triple-X  
 Cherry Hill High .....Adult...  
 Come with Me My Love .....Triple-X  
 Cover Girl .....Adult...  
 Dancers .....Triple-X  
 Debbie Does Dallas 2 .....Triple-X  
 Double Agent 73 .....Adult...  
 8 to 4 .....Triple-X  
 Electric Blue 001 .....Adult...  
 Electric Blue 005 .....Adult...  
 Electric Blue 007 .....Adult...  
 Eleven .....Triple-X  
 Emanuelle---The Joys of a Woman .....Adult...  
 Emilienne .....Adult...  
 Erotic Adventures of Candy .....Triple-X  
 Erotic Fantasies: Women with Women ..Triple-X  
 Erotic World of Seka .....Triple-X  
 Eroticise .....Adult...  
 Eyes of A Stranger .....Triple-X  
 Fantasy in Blue .....Adult...  
 Fast Cars Fast Women .....Adult...  
 Filthy Rich, The .....Triple-X  
 First Nudie Musical, The .....Adult...  
 Flesh Gordon .....Adult...  
 Forced .....Triple-X  
 Forever Emanuelle .....Adult...



French Finishing School .....	Triple-X
Fritz the Cat .....	Adult...
Gas Pump Girls .....	Adult...
Gemini .....	Triple-X
Getting Ahead .....	Triple-X
Girl From S.E.X., The .....	Triple-X
Girls and Their Toys .....	Triple-X
Happy Hooker, The .....	Adult...
Health Spa .....	Adult...
Her Name Was Lisa .....	Triple-X
Hey Goodlookin' .....	Adult...
Honey .....	Adult...
I Like to Watch .....	Triple-X
Illusions Within Girls .....	Triple-X
Indecent Exposure .....	Triple-X
In Love .....	Triple-X
Innocent, The .....	Adult...
Insatiable .....	Triple-X
Inside Desiree Cousteau .....	Triple-X
Inside Seka .....	Triple-X
I Spit on Your Grave .....	Adult...
Jailbait .....	Triple-X
Jesse St. James's Fantasies .....	Triple-X
Johnny Wadd .....	Triple-X
Joy .....	Adult...
Justine .....	Adult...
Kept After School .....	Triple-X

Ladies Night Out .....Adult...  
 L'Amour .....Adult...  
 Laura's Desires.....Triple-X  
 Lilly .....Adult...  
 Lipps and McCain .....Adult...  
 Liquid Assets .....Triple-X  
 Lisa Thatcher's Fantasies .....Triple-X  
 Little Darlings .....Triple-X  
 Little Orphan Dusty .....Triple-X  
 Little Orphan Dusty 2 .....Triple-X  
 Lolita .....Adult...  
 Macho Women .....Triple-X  
 Maliscious .....Adult...  
 Members Only .....Triple-X  
 Men at Work .....Adult...  
 Miss Nude America Contest .....Adult...  
 Mondo Topless .....Adult...  
 Mud Honey .....Adult...  
 Nana .....Adult...  
 Nasty Nurses .....Triple-X  
 Neon Nights .....Adult...  
 Olympic Fever .....Triple-X  
 1001 Erotic Nights .....Triple-X  
 Oriental Babysitter .....Triple-X  
 Peepholes .....Triple-X  
 Physical .....Triple-X  
 Pizza Girls .....Triple-X

Platinum Paradise .....Triple-X  
 Plato's Retreat West .....Triple-X  
 Platos, The Movie .....Adult...  
 Playboy Vol.1 .....Adult...  
 Playboy Vol.2 .....Adult...  
 Playboy Vol.3.....Adult...  
 Playmate Review .....Adult...  
 Please Mr. Postman .....Triple-X  
 Prisoner of Paradise .....Triple-X  
 Pro Ball Cheerleaders .....Triple-X  
 Rhinestone Cowgirls .....Triple-X  
 Roommates .....Triple-X  
 Satisfiers of Alpha Blue .....Triple-X  
 Scoundrels .....Triple-X  
 Screwplees .....Triple-X  
 Seducers, The (Death Game) .....Adult...  
 Sensational Janine .....Triple-X  
 Sex Roulette .....Triple-X  
 Sextoons .....Adult...  
 She-Male Encounters #5 .....Triple-X  
 Skintight .....Adult...  
 Sound of Love .....Triple-X  
 Starlet Nights .....Triple-X  
 Star Virgin .....Triple-X  
 Story of "O" .....Adult...  
 Sulka's Wedding .....Triple-X  
 Sunkist CCF-1 .....Triple-X

Supervixens .....Adult...  
 Swedish Erotica Vol.21 .....Triple-X  
 Sweet Captive .....Triple-X  
 Taboo .....Triple-X  
 Taboo #2 .....Triple-X  
 Tara Tara .....Triple-X  
 Taylor Evan's Fantasies .....Triple-X  
 Temptation .....Triple-X  
 That's My Daughter .....Triple-X  
 Till Marriage Do Us Part .....Adult...  
 Titillation .....Triple-X  
 Trashi .....Triple-X  
 Ultra Flesh .....Triple-X  
 Under the Doctor .....Adult...  
 Up and Coming .....Triple-X  
 Vanessa .....Adult...  
 Vanessa's Fantasies (Vol. 3) .....Triple-X  
 Velvet Edge .....Triple-X  
 Visions .....Adult...  
 Weekend Fantasies .....Triple-X  
 Wicked Sensations .....Triple-X  
 Young, Wild & Wonderful .....Triple-X  
 Yum Yum Girls .....Adult...













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# WORKING PAPERS ON PORNOGRAPHY AND PROSTITUTION

## Report # 16

### SEXUALITY AND VIOLENCE, IMAGERY AND REALITY: CENSORSHIP AND THE CRIMINAL CONTROL OF OBSCENITY

by  
N. Boyd

POLICY, PROGRAMS  
AND RESEARCH BRANCH  
RESEARCH AND  
STATISTICS SECTION





SEXUALITY AND VIOLENCE, IMAGERY  
AND REALITY:

CENSORSHIP AND THE CRIMINAL CONTROL  
OF OBSCENITY

NEIL BOYD, LL.M.

\*Prepared under contract with the  
Ministry of Justice, Canada

Neil Boyd,  
Associate Professor,  
Dept. of Criminology  
Simon Fraser University  
July, 1984



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The views expressed here are those of the author; the present and future policies of the Ministry of Justice are not presumed to be reflected in the analysis that follows.



PURPOSE AND METHOD  
OF STUDY





### PURPOSE AND METHOD OF STUDY

The purpose of this study was to review the legal status and the decision-making processes of four provincial censor boards, those in Ontario, Quebec, British Columbia and Nova Scotia.

The project necessarily involved an examination of the existing relationship between provincial control of censorship and classification and federal control of the Code's obscenity provisions. In the first section of the paper I set out the historical backdrop for both obscenity and censorship; statutory and case law, academic analyses, House of Commons Debates, and Committee proceedings have all been used to create a picture of our past.

In the second section of the paper I set out the specifics of censor board decision-making in the four provinces under study. I have focussed on the decisions that are most crucial to the legal sphere - those involving prohibitions of public exhibition. Board policies were made clear as a consequence of case analysis, study of annual reports, considerations inherent in statutory and regulatory provisions, and meetings with Board members in Vancouver, Toronto, Montreal and Halifax.

In the third section of the paper I focus on the present relationship between provincial powers of censorship and federal jurisdiction. Police and court data give some

indications of current practice in the federal sphere; case law reveals the interlocking nature of the roles of federal and provincial control. The question of appropriate targets for censorship and for criminalization is ultimately addressed; recent empirical research concerning aggressive pornography is canvassed and analyzed. The report finishes with seven conclusions relating to actions in both the federal and provincial spheres.

DATA AND  
ANALYSIS





It seems difficult, not surprisingly, to begin discussion in the arena of censorship. Though the provincial practice of prior restraint can more effectively suppress offensive material than the federal criminal process, the fear of unjustly restricting expression lurks in the shadows in both instances.<sup>1</sup>

And yet the images that "pornography" promotes are, for the most part, as Britain's Williams Report would have it, "ugly, shallow, and obvious."<sup>2</sup> The task that confronts the student of legal control is that of both separating and connecting imagery and reality.

The federal government has been involved in the construction of definitions of obscenity since 1892;<sup>3</sup> the provinces have been engaged in prior restraint of the medium of film since 1911.<sup>4</sup> These legacies are instructive, revealing fundamental changes in the nature of public

-----

<sup>1</sup> For a most recent judicial discussion of this issue in the federal sphere see R. v. Red Hot Video, 6 C.C.C. (3d) 331. For a consideration of provincial powers of censorship see Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, (1983) 147 D.L.R. (3d) 58, 141 O.R. (2d) 583.

<sup>2</sup> Report of the Committee on Obscenity and Film Censorship, Bernard Williams, Chairman. London, Home Office, 1979 at p.96.

<sup>3</sup> Statutes of Canada, 1892, c.29.

<sup>4</sup> Statutes of Ontario, 1911 The Theatres and Cinematograph Act, c.73.

concern. Media of communication have expanded in type, scope and intensity; the production of the sexually explicit images of 1984 starkly reveals a portrait of human relations that could not be comprehended by Canada of 1892, or 1911.

Defining the Intolerable: The Genesis of Censorship and  
Obscenity

Until 1959 Canadian courts relied upon Britain's Hicklin<sup>5</sup> test for a judicial enunciation of the notion of obscenity. While the provinces have historically limited themselves to prior control of the public exhibition of film,<sup>6</sup> the concerns of the federal government have not been so constrained. Indeed, Ontario's recent decision to control the exhibition of videotapes in private homes is arguably noteworthy, in this context. The technological development and mass consumption of a new medium can help to restructure the perception of federal and provincial responsibilities for the control of offensive material. As media of communication expand and contract, federal-provincial dialogue regarding the roles of censorship and obscenity becomes a matter having greater

-----

<sup>5</sup> R. v. Hicklin, (1868) 3 Q.B.D. 360.

<sup>6</sup> David Price has perceptively commented on the notion of public exhibition of film in "The Role of Choice in a Definition of Obscenity, 57 Canadian Bar Review 301, at 318.

salience.<sup>7</sup> It seems useful, then, to inform the present--to chart this relationship in historical context.

Inappropriate sexual arousal has always been at the heart of the criminal offence of obscenity, crime comics and depictions of prizefights notwithstanding. Chief Justice Cockburn first wrote in R. v. Hicklin in 1868, "...the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."<sup>8</sup> Although the Hicklin conception of obscenity has met with considerable judicial and academic criticism, it did have a political life of almost 70 years in Canada.<sup>9</sup>

In early applications Canadian courts worried about the immorality that the potential for sexual arousal might produce. In 1905 in R. v. Beaver,<sup>10</sup> the Ontario Court of Appeal said of a printed paper, "There can be no doubt that the language complained of is so foul and disgusting that it would prove repulsive to most persons reading it, and is so gross that there would be no danger of its corrupting their morals. But unfortunately there are others susceptible to -----

<sup>7</sup> See below, Obscenity and Censorship: A Question of Focus.

<sup>8</sup> See note 5, above, at p.371.

<sup>9</sup> See W.H. Charles, "Obscene Literature and the Legal Process in Canada", 44 Canadian Bar Review 243 (1966). For an early indication of judicial discontent with Hicklin, see R. v. Stroll (1951) 100 C.C.C. 171 (Mtl. Ct. of Sess.)

<sup>10</sup> R. v. Beaver, (1904) 9 C.C.C. 415 (Ont. C.A.)

lustful ideas upon whom it would have precisely the opposite effect."<sup>11</sup>.

In other cases reported during the early twentieth century, Canadian courts similarly endorsed the application of the Hicklin test. W.H. Charles has said of his canvassing of obscenity decisions from 1900 to 1940, "it seems fair to conclude that the Hicklin test was applied with all its vigour. Some publications were condemned on the basis of isolated passages, which were considered to have a possible tendency to corrupt and deprave a susceptible minority, even though most persons would be disgusted rather than corrupted by the material. In all cases the author's intention or motive was completely disregarded."<sup>12</sup>

Amendments to federal obscenity provisions were made in 1900, 1909, 1913, and 1949, prior to the reconstruction of 1959. Particularly illuminating is the Criminal Code Amendment Act of 1913. Section 8 of the Act prohibited "...an advertisement of any means, instructions, medicine, drug or article for restoring sexual virility, or curing venereal diseases, or diseases of the generative organs."<sup>13</sup> On the face of it, this appears as patriarchial repression

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<sup>11</sup> Ibid, p. 422-423.

<sup>12</sup> See note 9, above, 44 Canadian Bar Review at 246.

<sup>13</sup> Statutes of Canada, 1913, Criminal Code Amendment Act, c.13, s.8.



of dysfunctional sexuality. Only male "virility" is properly thought the target of the law. The advertisement of appropriate treatment for venereal disease, or other diseases of reproductive anatomy, scarcely seems an appropriate object for the criminal sanction. And yet this prohibition remains today as s.159(2)(3) of the Code; it seems difficult to make sense of its continued inclusion.

Amendments to Criminal Code provisions respecting obscenity were not generally focused upon amending the Hicklin definition, until 1959. Only in 1949 was the issue of more precisely categorizing obscenity specifically addressed, with the criminalization of the crime comic.<sup>14</sup> The bill introduced was entitled, "Pictures in magazines etc. tending to induce violence", and was the work of the architect of the 1959 revision, E. Davie Fulton. There is, then, a sense of déjà vu, with respect to current debate about the negative content of images of violence. What is fundamentally different in the present is the focus given to violence against women. Sexual arousal, per se, is accepted, indeed welcomed. As the Toronto Area Caucus of Women and the Law suggests, "...It is not erotica to which women object - it is pornography. In erotica neither sex is degraded, nor is either sex seen as a target of violence.

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<sup>14</sup> Statutes of Canada, 1913, Criminal Code Amendment Act, c.13, s.1(3).



...What women object to is not material of an erotic or sexual nature; what we object to is pornography, that is, material that shows violence against, or humiliates or degrades women."<sup>15</sup>

Sexual arousal has not always been so kindly regarded within the public sphere. On March 24, 1911, Ontario, Quebec, and Manitoba all passed Acts to both licence and censor public exhibitions of film. In their first few years of operation, the provinces were often involved in suppression of film commentary concerning venereal disease. There was a reluctance to acknowledge the unsavoury side of the sexual contacts of Canada's young men at war.<sup>16</sup> In 1919 the Ontario Censor Board prohibited exhibition of The End of the Road, a Y.W.C.A. sponsored film, described as "one of the strongest forces for arousing public opinion to the necessity of fighting venereal diseases."<sup>17</sup>

Ontario's initial statute, The Theatres and Cinematographs Act, tended to be rather prohibitive in its

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<sup>15</sup> Toronto Area Caucus of Women and the Law, "Pornography: The Law and Women's Rights" unpublished manuscript, 1984, at 45.

<sup>16</sup> A useful discussion of the early years of provincial censorship of film can be found in Malcolm Dean's Censored Only in Canada, Toronto, Virgo Press, 1981. Though the book simply endorses existing libertarian analyses, it does sketch a valuable history.

<sup>17</sup> This was the position of the Canadian National Council for Combatting Venereal Disease, outlined in Censored Only in Canada, note 16, above, at p. 24.

early operation.<sup>18</sup> In its first few years the Board approved only 25 per cent of all films submitted. But legislative enactment was not, and never has been, at the heart of censor board decision-making. The present section 2(a) of Ontario's Theatres Act maintains a power first given in 1911, "to censor any film and...remove by cutting or otherwise from the film any portion thereof that it does not approve of for exhibition in Ontario."<sup>19</sup>

While the evolution of obscenity law is best understood by case analysis, the evolution of censorship is best understood by examining the tenure of successive censor boards. The power of prohibition has always existed, as with the criminal offence of obscenity. But while judicial decisions have necessarily built upon pre-existing case law, successive censors have set out distinctive and often discontinuous models of censorship and classification. This need not be regarded as philosophically or practically repugnant, however; provincial autonomy in the control of public exhibitions cannot be expected to necessarily yield a chronological consistency.

Malcolm Dean has called Ontario's O.J. Silverthorne,

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<sup>18</sup> Ibid, pp. 135 - 138.

<sup>19</sup> Revised Statutes of Ontario, 1980, The Theatres Act, c.498 s.2(a).

"the very model of a modern censor."<sup>20</sup> Omri J. Silverthorne became chairman of the Ontario Censor Board before the age of 30; for almost 40 years Silverthorne's thought shaped the structure of decision-making. From 1936 to 1974, Silverthorne weathered the storms of censorship, and of its critics. In 1971 he told a conference of Canadian censors, "...the outcry which went up in Ontario over the censoring of films such as *Elmer Gantry* and *Saturday Night and Sunday Morning* is proof enough that we frequently go too far in our work...perhaps the time has come to start considering the abolition of censorship by government fiat in Canada...I would like to see censorship as it is presently being practised abolished in Canada within the next two years."<sup>21</sup>

And yet Silverthorne and the Board were not reluctant to ask for eliminations that were statements of inflamed sexuality. In 1967, with the film *Ulysses*, the following passage was excised, "I often felt I wanted to kiss him all over, also his lovely young cock there so simply. I wouldn't mind taking him in my mouth if nobody was looking, as if it was asking you to suck it. So clean and white he looked with his boyish face."<sup>22</sup>

While O.J. Silverthorne's first twenty years of office were relatively uneventful, through the late sixties and

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<sup>20</sup> Censored Only in Canada, note 16 above , pp. 138 - 148.

<sup>21</sup> Ibid, p. 147.

<sup>22</sup> Ibid, p. 145.

early seventies the realities of the "sexual revolution" began to be reflected in an increasing number of films. The Censor Board in Ontario, and boards in Quebec, Nova Scotia, and British Columbia were having to respond to new boundaries of tolerance regarding the role of sexuality in the public domain. Taboos regarding the display of pubic hair and genitalia were re-examined and ultimately abandoned, albeit at different times and in different contexts in the four provinces. Unlike the federal criminal process, provincial control of censorship has not been tied to specific changes in statute and case law, excepting Quebec's "Padlock Law" of 1936. The 1959 amendment to federal obscenity provisions similarly does not appear to have impacted directly upon provincial approaches to censorship and classification.

In Quebec the early years of censorship reflected not only a moral, but a social and political agenda. This circumstance was most pronounced during the reign of Maurice Duplessis, with the Padlock Act of 1936 the epitome of the spirit of the times. Ultimately rejected by the Supreme Court of Canada as a repugnant restriction upon freedom of expression, the Act exerted dominance, nonetheless, for over 20 years. The statute's expressed purpose of protecting the province against Communist propaganda infused the work of Quebec's censors; films supportive of trade unionism were



clear targets for prohibition.<sup>23</sup>

But the twin concerns of inappropriately depicted violence and inappropriately depicted sexuality were also dominant in Quebec during this period of time. Malcolm Dean notes of the standards of the Quebec Censor Board in the 1930's, "Allusion to divorce in dialogue was to be permitted in films, but divorce was never to be presented attractively... In crime films, the use of firearms (was to) be restricted to essentials."<sup>24</sup>

This restrictive era in Quebec's practice of film censorship came to an end with the appointment of Andre Guerin as president of the Board in 1962; Guerin, Pierre Saucier, Jean Tellier, and others have since fashioned a stewardship of film, often critically acclaimed for its thorough analysis of the medium.<sup>25</sup> Criticisms of the Quebec Board of Cinema Censors had led the provincial government to form a "Provisory Committee for the Study of Film Censorship" in 1961. The Regis Committee was unequivocal in its denunciation of Quebec's practice to that date, "There is only one way to describe both the practice of this

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<sup>23</sup> Interestingly, recent decisions in Re Ontario Film and Video Appreciation Society note 1 above and Re Nova Scotia Board of Censors et al and McNeil (1978) 84 D.L.R. (3d) 1, suggest a continuing judicial concern with unfettered provincial powers of prohibition.

<sup>24</sup> Censored Only in Canada, note 161, above, at 159.

<sup>25</sup> See "Andre Guerin et Son Bureau Unique Au Monde", LaPresse, Jan 10, 1981, C-1-C2 and Ted Blackman, "How the censors judge the Movies", Montreal Gazette, Jan. 19, 1983.



institution and the spirit which animates it: it is completely archaic and the Committee believes it to be beyond recall."<sup>26</sup> While Ontario's early years of operation reflected the liberalism of O.J. Silverthorne's administration, Quebec's early censors were apparently more restrictive in the spirit of their rhetoric and the substance of their actions.

British Columbia and Nova Scotia both constructed statutes for censorship of film within a few years of the Ontario-Quebec-Manitoba initiative.<sup>27</sup> In both provinces the early years of censorship were marked by restrictive application of existing statutory provisions. The twin concerns of images of sexuality and images of violence were again evident, albeit at different points of time, within both provinces. In British Columbia A Law Unto Himself was prohibited for amounting to "nothing but gun-play, robbery, violence and gruesome scenes, with no redeeming features"<sup>28</sup>; in Nova Scotia Who's Afraid of Virginia Woolf was prohibited for its "obscenity" and "blasphemy", "four-letter words", and "colloquial references to

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<sup>26</sup> Quoted in The Democratic State and Its Attitude to Film and Publications, unpublished address to Directors of the Greater Quebec Area Police Departments, 1969, p.4.

<sup>27</sup> Statutes of British Columbia, 1913, "An Act to Regulate Theatres and Kinematographs" Statutes of Nova Scotia, 1915 "An Act Respecting Theatres and Cinematographs", c. 36.

<sup>28</sup> Censored Only in Canada, note 16, above, at 118.

copulation."<sup>29</sup>

In both provinces a restrictive era of censorship was ultimately accompanied by increasing criticism and subsequent entrance into a more liberal era. In British Columbia Ray MacDonald's ascendance to chief censor in 1954 marked this change of style; in Nova Scotia provincial Secretary Gerald Doucet's 1966 call for a study of film censorship marked the end of a more restrictive period of operation.

And yet the early history of film censorship in Ontario, Quebec, Nova Scotia, and British Columbia is better understood as discontinuous than as continuous. While Ontario worked within the rhetoric and style of liberalism, Quebec, Nova Scotia, and British Columbia had embarked upon more restrictive routes of control. More importantly, the ebb and flow of opposing models of censorship reveals few consistent patterns across the four provinces over time, arguably testimony to the value of autonomy in the matter of prior restraint.

With the federal power over obscenity, our discussion of the past reveals a similar ebb and flow, at least insofar as the appropriate target for the criminal law is concerned. The late forties and early fifties were a time in which sexuality became more prominent in the public domain.

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<sup>29</sup> Ibid, p. 134.

Indeed, the 1953 Senate Committee concerning Salacious and Indecent Literature was formed as a consequence of public reaction to this new prominence.<sup>30</sup> Case law from this period reveals both increasing tolerance of sexuality in public view, and increasing public concern over this development.

Particularly representative of this debate was the decision of Lazure, J., in Conway v. The King.<sup>31</sup> The court was asked to rule upon the legality of an allegedly obscene theatrical performance at Montreal's Gayety Theatre. Six young women appeared largely naked from the shoulder to the waist and stood motionless during the performance of Spin A Web of Dreams. While evidence led in court established that the women wore "...brassieres or bust bodices made of a very light material",<sup>32</sup> this was not sufficiently exculpatory for the trial court judge. Cloutier, J. Sess. concluded that, "...from the evidence as a whole it may be said that the performance in question boldly displayed persons of the fair sex so scantily clothed that it was immoral, indecent or obscene."<sup>33</sup> Lazure, J. allowed the appeal against conviction, noting, "Since the actresses could neither move nor speak, but sought to represent statues, it seems quite

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<sup>30</sup> The Senate of Canada, Proceedings of the Special Committee on Sale and Distribution of Salacious and Indecent Literature, Queen's Printer, Ottawa, 1952.

<sup>31</sup> Conway v. The King (1944) 2 D.L.R. 530.

<sup>32</sup> Ibid, p. 533.

<sup>33</sup> Ibid, p. 535.

evident to me that the object was not to suggest obscenity...the intention was to create an artistic background and not an immoral scene."<sup>34</sup>

The objection to Conway v. The King was representative of public reaction to changing conceptions of both nudity and sexuality; the very real images of film, stage, and print photography were reflections of a changing social order and were in turn serving to structure thought. The Senate Committee of 1952 was constructed in an attempt to speak to the tensions that had arisen.

The proceedings of the Special Committee reveal that the developing sexuality of Canadian youth, and indeed Canadian adults, was central to all agendas. The Committee's report to Parliament concluded "...those who print, import, distribute or exhibit for sale salacious and indecent publications will feel the force of this public opinion and be made to realize that they are doing a filthy, immoral and nasty thing to the detriment of Canada in its present position...anything that undermines the morals of our citizens and particularly of the young, is a direct un-Canadian act."<sup>35</sup>

The rhetoric here is historically specific, with submissions to the committee complaining of "positions

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<sup>34</sup>Ibid, p. 536.

<sup>35</sup>See note 30, above, at 246.



calculated to arouse lascivious emotions" and "highly coloured illustrations of would-be provocative nudes."<sup>36</sup> The Ottawa Catholic Parent Teacher Associations suggest the prohibition of teen-age records, "sold to teenagers for teenage parties, which are, to say the least, frankly suggestive and intended to attend the "Smooch Session", when the lights are low. The Association continued,"...We may add that we are not unaware of the filthy films and records purveyed to adult audiences; but of these we prefer not to speak here."<sup>37</sup>

And yet there are criticisms that are enduring, this distant rhetorical framework notwithstanding. The Special Committee heard of pornography's ignorance of the spiritual aspects of human relationships, what we now may term the commodification or objectification of sexuality.<sup>38</sup> Margaret O'Brien, Chairman of the Provincial Committee on Good Literature, further suggested, "Lurid sex literature in the hands of the very young is not apt to excite emotion and animal instincts...but (it does) colour their attitudes towards society and so tend to undermine the family unit on

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<sup>36</sup> Ibid, p.38.

<sup>37</sup> Ibid, p.38.

<sup>38</sup>For an interesting, albeit problematic discussion of the subjects of commodification and objectification, see Germaine Greer, Sex and Destiny, London, Secker and Warburg Limited, 1984.



which our society is based".<sup>39</sup> The family unit has, perhaps more fairly, been subject to rapid changes in both structure and composition over the past 32 years. What remains unclear are the complementary roles that pornography possesses - to both reflect and impact upon social order.

Interestingly, the Special Committee found the Hicklin test "explicit" and "enforceable". They noted, "No cases have been brought to the attention of the Department of Justice in which prosecutions have failed through any vagueness in the law. The law is quite explicit."<sup>40</sup> The Committee did, however, acknowledge existing complaints with the conciliatory statement, "The Department of Justice further adds that if, after experience with the enforcement of this law, it is shown that it is not enforceable, the Government of Canada will be willing to again consult with the provincial authorities to that end, and revise existing legislation."<sup>41</sup>

From 1953 to 1957 the Minister of Justice affirmed his support for the Hicklin test. But, with the election of a Conservative government, the most outspoken opponent of the test, E. Davie Fulton, was elevated to the status of Minister of Justice. Mr. Fulton had told the Special Committee in 1952 that the Hicklin test is purely subjective

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<sup>39</sup>See note 30, above, at 201.

<sup>40</sup>Ibid, p. 246.

<sup>41</sup>Ibid, p. 246.

and that "more workable" legislation is necessary. W.H. Charles notes in a 1966 Canadian Bar Review article, "The offensive type of publication which Mr. Fulton had in mind included pulp and pocket magazines as well as magazines featuring nude or half nude females. These magazines were dangerous, Mr. Fulton suggested, because youngsters would try to imitate the actions described in the magazines and would thus have their morals perverted."<sup>42</sup>

In speaking to the House of Commons in July of 1959, Mr. Fulton said of Bill C-58, "We believe we have produced a definition which will be capable of application...in addition to the somewhat vague subjective test. ...The tests will be: does the publication complained of deal with sex, or sex and one or more of the other subjects named? If so, is this a dominant characteristic? Again, if so, does it exploit these subjects in an undue manner?"<sup>43</sup>

Mr. Fulton was suggesting that the Hicklin test was not being displaced; the ambit of obscenity control was simply expanding. It was the Minister's intention that the definition be extended. He stated, "In our efforts we have deliberately stopped short of any attempt to outlaw publications concerning which there may be any contention that they have genuine literary, artistic or scientific

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<sup>42</sup> W.H. Charles, note 9 above, at 251.

<sup>43</sup> Canada, House of Commons Debates, July 6, 1959, 1t 5517.

merit. These works remain to be dealt with under the Hicklin definition, which is not superseded by the new statutory definition."<sup>44</sup>

Mr. Fulton's analysis was not shared by the Supreme Court of Canada. In its first reading of obscenity after the 1959 amendment, the Court considered D.H. Lawrence's "literary work", Lady Chatterley's Lover, using the new s.159(8) as the relevant definition of the offence. In Brodie, Dansky, and Rubin v. The Queen,<sup>45</sup> the Supreme Court of Canada did not so much rule out the Hicklin test as possible, but rather displaced it as the operative standard.

It is important to note that concerns regarding freedom of expression existed at the time of Bill C-58. The opposition quoted approvingly from Frank Underhill of the University of Toronto, "The point that I am trying to make is that modern literary artists, in their concentration on sex, violence, and societies in decay, are not just exploiting these themes for the sake of vulgar notoriety and best-seller profits. They are trying, seriously and intensely, to say something significant about the condition of man in our day. ...If they look on the black side, and present painful or repulsive pictures of human beings in action, can anyone blame them who has been sensitive to the

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<sup>44</sup> Ibid, p. 5517.

<sup>45</sup> 45 Brodie, Dansky and Rubin v. The Queen, (1967) S.C.R. 681, 132 C.C.C. 161, 32 D.L.R. (2d) 507, 37 C.R. 120.

experience of our age."<sup>46</sup>

While it is difficult to assert that much of today's pornography attempts "seriously and intensely, to say something significant", it is fair to note that in both 1959 and 1984 we can see reflections of social order; the reality of sexual relations in 1984 is that we have both "painful or repulsive pictures of human beings in action"; pornography remains a very real reflection and commentary upon the times in which we live.

Mr. Fulton's 1959 statute did, however, produce significant changes in the structure of the legal control of obscenity. The judiciary quickly developed the new standard. In Brodie, Dansky and Rubin the Supreme Court stated that Canadian Courts must look to the serious purpose of the author or producer, to the artistic merit of the matter in dispute, and to community standards. Judson, J. quoted approvingly from Fullagar, J. in R. v. Close,<sup>47</sup> "There does exist in any community at all times - however the standard may vary from time to time - a general instructive sense of what is decent and what is indecent, of what is clean and what is dirty, and when the distinction has to be drawn, I do not know that there is any better

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<sup>46</sup> Canada, House of Commons Debates, June 30, 1959, at 5314.

<sup>47</sup> R. v. Close, (1948) V.L.R. 445.



tribunal than a jury to draw it."<sup>48</sup>

This analysis represented a marked departure from the Hicklin test. The weakest members of the community, those "open to immoral influences" were not the focus of concern. As Freedman, J.A. pointedly remarked in Dominion News and Gifts v. The Queen, "...a large readership is...not always an entirely irrelevant factor, it may have to be taken into account when one seeks to ascertain or identify the standards of the community in these matters. Those standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered."<sup>49</sup> Justice Freedman's remarks were affirmed by the Supreme Court in 1964, and in the years since, the judiciary has further defined this concept. It now seems clear that it is a national community standard that defines obscenity, not that of a university community, city, or province.<sup>50</sup> Ontario Crown Attorney David Price further notes, "In recent years, the relevant Canadian

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<sup>48</sup> Brodie, Dansky and Rubin v. The Queen, note 45 above, 132 C.C.C. at 182.

<sup>49</sup> Dominion News and Gifts v. The Queen, (1967) 3 C.C.C. 1 and 2 C.C.C. 103 (1969) (Man. C.A.).

<sup>50</sup> See R. v. Goldberg and Reitman (1971) 4 C.C.C. (2d) 187 (Ont. C.A.), R. v. Kiverago (1973) 11 C.C.C. (2d) 463 (Ont. C.A.) and R. v. MacMillan Company of Canada Ltd. (1976) 31 C.C.C. (2d) at p. 322.



community standard has been defined to be the standard of tolerance and not the standard of acceptance. The phrase "exceeds the accepted standard of tolerance in the community" was coined by McGillivray, J.A. in his judgement in the case of R. v. Goldberg and Reitman<sup>51</sup> and has been applied in numerous judgements since."<sup>52</sup>

The Hicklin test, in its use of the words "deprave" and "corrupt", necessitates a demonstration of harmfulness; the community standards test requires no demonstration of harm - it is sufficient that the publication in question exceed the accepted standard of tolerance. The implications here for provincial censorship are far reaching. Censor Board decision makers view themselves as answerable to the provincial community; they are influenced by discussion concerning the potential harm that pornography may impose, but they are ultimately bound by a standard of community tolerance, the issue of social harm notwithstanding.

And yet public discussion of obscenity and censorship is centered upon the issue of harm. While retrospective analysis often reveals that fears have been overstated, the hypothesis of harm is always present. In 1984 a growing body of empirical literature focuses its attention upon specific kinds of harm flowing from images that promote or

<sup>51</sup> See note 50 above.

<sup>52</sup> David Price, 57 Canadian Bar Review, note 6, above at 312.

condone sexual violence.<sup>53</sup> In 1959 there was a quite different concern - that young men "would have their morals perverted" by looking at photographs of naked women. The issue of harm has remained at the centre of public concern, nonetheless.

And yet "obscene" material itself is constantly being redefined through the medium of case law, legislative amendments notwithstanding. As Simon Verdun-Jones notes, "...the allegedly obscene pages in Lady Chatterley's Lover appear extremely tame in light of the type of explicit sexual material that is available in the 1980's. ...When George Bernard Shaw's play Pygmalion was originally produced in turn-of-the-century England, there was a public outcry when Eliza Doolittle uttered the line, "not bloody likely". ...when the movie Gone with the Wind first appeared some forty years ago, there was considerable public disapproval of Rhett Butler's immortal, "Frankly, My Dear, I Don't Give a Damn." From today's perspective, it is difficult to imagine why there was such public consternation in relation

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<sup>53</sup> Perhaps the most comprehensive and analytic discussion of this research is Edward C. Nelson's "Pornography and Sexual Aggression", in M. Yaffe and E.C. Nelson, The influences of pornography on behaviour, London, Academic Press, 1982. One should also see N. Malamuth and E. Donnerstein, "The Effects of Aggressive-Pornographic Mass Media Stimuli", 15 Advances in Experimental Social Psychology, 103, Academic Press, 1982 and T. McCormack, "Machismo in Media Research: A Critical Review of Research on Violence and Pronography", 25 Social Problems 544-555, 1978.

to these utterances."<sup>54</sup> The definition of obscenity appears to form a closer attachment to changing social structure than to changing legislative enactments. Taboos against explicit sexuality on the screen have not been erased by statute; case law appears as the important medium of analysis, over time, arguably the more used and useful tool in the development of state policy.

Indeed, the state of the legislative definition of obscenity remains a subject of debate today. In 1977, in Dechow v. The Queen,<sup>55</sup> the Supreme Court had yet to resolve the issue of the Hicklin test's application; it can still be fairly suggested that the Hicklin test and s.159(8) provide complementary definitions of obscenity, that both are properly used by the judiciary.<sup>56</sup> In Dechow the Court was asked to determine whether a number of sexual aids or "stimulators" were publications, within the meaning of s.159. While it has always been clear that in the case of "publications", s.159(8) supersedes Hicklin, it is arguable that Hicklin could be applied to an obscenity that is not a publication. Counsel for the accused contended that the sexual aids in question were not publications, and that

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<sup>54</sup> Simon Verdun Jones, Criminal Law 230, Disc Course, Simon Fraser University, 1984, Course Reader; p. 43.

<sup>55</sup> Dechow v. The Queen, (1977) 35 C.C.C. (2d) 22, 76 D.L.R. (3d) 1, s.c.c.

<sup>56</sup> For all practical purposes s.159(8) supersedes the 1868 pronouncement; Hicklin has never actually been applied in any reported decision since 1959.

Hicklin could not apply, s.159(8) providing the sole definition of obscenity in Canada. The majority in Dechow found the sex devices, "Anal Stimulator", "Automated Cunnilingus" and "Robot Lover", among others, to be publications and hence found it unnecessary to speak to the exhaustiveness of the s.159(8) definition of obscenity. The dissent of the late Chief Justice Laskin accepted the dual contentions of the defence, that the sexual aids were not publications, and that s.159(8) is the exhaustive test of obscenity in Canada. Bill C-19 now suggests that the intention of the government is to make the statutory definition of obscenity an exhaustive one; the word "publication" has been replaced with the words "matter or thing". "Matters" or "things" are now to be deemed obscene, a more inclusive class of objects than that of publications.

This continuing difficulty concerning the roles to be accorded to different legal definitions of obscenity has little salience, however, placed outside the context of legality. For purposes of common practice, the statutory definition of obscenity is the operative standard in Canadian courts.

What is of greater salience in the development of social policy is the role that restrictions on access have played in making determinations of obscenity. In R. v.

Harrison<sup>57</sup> an allegedly obscene film was shown at a community hall to some twenty-five male guests; a posted notice indicated that a private party was in progress. The Alberta District Court held that there was no exposure to "public view", within the meaning of s.159(2) (a) of the Code, and hence no finding of obscenity. In R. v. Murphy<sup>58</sup> a theatrical performance was found not to be obscene, the court influenced by the fact that performances were limited to adults who paid to see naked women dancing on stage, adults who had been clearly informed by advertising regarding the nature of the "entertainment". In R. v. MacMillan Company of Canada<sup>59</sup>, the court noted that the packaging and pricing of the book Show Me effectively limited readership to adults, and suggested that a child would have to have the guidance of an adult in understanding the book's contents.

In all of these instances the court is making clear the relative nature of the legal conception of obscenity. With the emergence of sexuality in the public domain, the issue is often not one of prohibition, but of the regulation of access through the medium of the criminal process. As David Price has suggested, "...a line of judicial authority...has

<sup>57</sup> R. v. Harrison, (1973) 12 C.C.C.(2d) 26 (1973) 4 W.W.R. 439 (Alta. Dist. Ct.)

<sup>58</sup> R. v. Murphy, (1972) 3 C.C.C.(2d) 313.

<sup>59</sup> R. v. MacMillan Company of Canada Ltd. (1976) 31 C.C.C.(2d) 286.



developed in recent years to give effect to circumstances of exposure so as to distinguish between what the public will accept for its own viewing and what the public as a whole will tolerate being viewed by those of its members who wish to do so." <sup>60</sup>

The role of the expert witness in determinations of obscenity has similarly been developed by judicial pronouncements. The question of whether allegedly obscene material exceeds a national standard of tolerance is one that can be informed by empirical test. Dickson, J.A. has helped to establish the parameters here stating in Regina v. Prairie Schooner News Ltd. and Powers,<sup>61</sup> "...the "community" whose standards are being considered is all of Canada. The universe from which "the sample"...is to be selected must be representative of Canada and not be drawn from a single city."<sup>62</sup>

In R. v. Pink Triangle Press<sup>63</sup> the Ontario Court of Appeal ruled that there is no requirement that public opinion surveys on the subject of community standards form part of the evidence led by the Crown, that it is ultimately the duty of the Court to determine the legal question of

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<sup>60</sup> David Price, 57 Canadian Bar Review, note 6, above, at 324.

<sup>61</sup> R. v. Prairie Schooner News Ltd. and Powers (1970) 1 C.C.C.(2d) 251, 75 W.W.R. 585.

<sup>62</sup> Ibid, p. 258.

<sup>63</sup> R. v. Pink Triangle Press (1980) 51 C.C.C.(2d) 485 (Ont. C.A.), reversing (1979), 45 C.C.C. (2d) (Ont. Co. Ct.)

community tolerance. While the Canadian community's standard of tolerance is amenable to empirical test, both Crown and defence counsel have been reluctant to enter the fray, in any kind of systematic manner. The judiciary's construction of strict methodological requirements and the consequent costs of empirical study have tended to work against any routine introduction of opinion survey evidence. Implicit in such judicial analysis is the notion that research capable of any methodological criticism cannot be of assistance to the court; the judiciary has often declined the role of evaluating social science data. Given the ability of both Crown and defence counsel to call expert testimony to assist the Court, this seems an unnecessary reluctance.

The community standards test remains as problematic, nonetheless. While the Hicklin test requires that the judiciary believe an alleged obscenity is harmful, the present statutory provision mandates criminalization on the criterion of offensiveness. The Toronto Area Caucus of Women and the Law has suggested that "...Obscenity is vague and changeable. As sado-masochism becomes more commonly portrayed throughout our society, the "community standard of tolerance" would no doubt be said to increasingly accept sado-masochism. In contrast, we think that violence against

women is inherently unacceptable."<sup>64</sup>

The point here is well taken, insofar as it critiques the logic on which the criminalization of obscene matter is now resting. The criminalization of obscenity must arguably be more than an index of community intolerance; the issue of social harm should not be allowed to escape from judicial rhetoric. A 1979 survey by Market Facts established that while 61 percent of Ontarians would cut or ban "explicit sexual intercourse" and 61 percent "vividly portrayed scenes of violence", 67 percent would cut or ban "sex between two women or two men."<sup>65</sup> The standard of community intolerance may, then, demonstrate a lack of consistency in the morality that it espouses. As we turn our attention to the subject of censor board decision-making, we will see more clearly the limitations of the tolerance test as a final arbiter of the process of criminalization.

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<sup>64</sup> Toronto Area Caucus of Women and the Law, note 15, above, at 27.

<sup>65</sup> Market Facts of Canada, A Study of Attitudes in Ontario, Movie Censorship and Classification, Report prepared for the Ministry of Consumer and Commercial Relations, p. 19.

Censor Board Decision Making: Constructing Community  
Standards

Unlike the federal power over the construction of criminal law, provincial control of the process of prior restraint is more properly subject to the "community standards" test. The decision here is not one of prohibition, but rather one of determining the context in which access can occur. With the classification of public exhibitions, community intolerance provides a useful guide for an essentially regulatory function. Access to private exhibition is, to this date, beyond the ambit of censor board powers in British Columbia, Ontario, Quebec, and Nova Scotia.<sup>66</sup>

British Columbia's Motion Picture Act provides that "...every film intended for public exhibition or display in a motion picture theatre in the Province shall first be

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<sup>66</sup> As is argued below, it is nonetheless difficult to draw this line between the public and the private sphere. It is not clear that the standard of prohibition should be markedly different in these two instances. See Obscenity and Censorship: A Question of Focus, below.

submitted to the director for approval."<sup>67</sup> The powers of the director are spelled out in section four; s.4(c) states that he or she may "subject to this Act, approve, prohibit or regulate exhibiting or displaying of a film in the Province."<sup>68</sup> The specifics of British Columbia's controls are set out in s.8(2); the Act provides that approved films will be classified as either "(a) general, being suitable for all persons; (b) adult, being unsuitable for or of no interest to a person under the age of 18 years; or (c) restricted, being suitable only for a person 18 years of age or over."<sup>69</sup> Interestingly, s.8(3) further provides that a person under 18 may attend a "restricted" movie, if accompanied by "...his parent or other responsible adult person", the section stressing the value of individual adult choice in determining access to the theatre.

The Motion Picture Act provides powers of both censorship and classification; in practice, films may be rejected, may run with eliminations, and will always be classified as either general, mature, or restricted entertainment. The legislative framework of censorship is quite similar in Ontario, Quebec, and Nova Scotia; powers of rejection and classification exist in all four provinces.

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<sup>67</sup> Revised Statutes of British Columbia, 1979, The Motion Picture Act, c. 284, s.6.

<sup>68</sup> Ibid, s.4(c).

<sup>69</sup> Ibid, s.8(2).



But it is here that any marked similarity ends; the provinces have created distinctive approaches to prior restraint, in their statutory language alone.

Ontario's Theatres Act dictates that "No person shall exhibit or cause to be exhibited in Ontario any film that has not been approved by the Board."<sup>70</sup> Section 1(c) of the Act defines exhibit, "...when used in respect of film or moving pictures, (exhibit) means to show film for viewing for direct or indirect gain or for viewing by the public..."<sup>71</sup> The section is more inclusive in its definition than is British Columbia's Motion Picture Act. Section 6(2) of the Motion Picture Act exempts federal and provincial governments, universities, film societies, and certain educational institutes from the operation of the statute. The powers of Ontario's censors are set out in s.3(2)(b) of the Theatres Act, "subject to the regulations, to approve, prohibit or regulate the exhibition of any film in Ontario."<sup>72</sup>

Ontario's categories of classification are family, parental guidance advised, adult accompaniment required, and restricted to those 18 and over.<sup>73</sup> The adult accompaniment category dictates that children under 14 will only be

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<sup>70</sup> Revised Statutes of Ontario, 1980, The Theatres Act, c.498, s.38.

<sup>71</sup> Ibid, s.1(c).

<sup>72</sup> Ibid, s.3(2)(b).

<sup>73</sup> Ontario, Ministry of Consumer and Commercial Relations, Theatres Branch Annual Report 1982-1983, pp. 14 - 15.

allowed admission, if accompanied by an adult; Ontario's Adult Accompaniment classification is much like British Columbia's Restricted classification, with the age of accompaniment simply raised to 18 in the latter case.

Quebec's new Cinema Act states that "No person may...exhibit a film to the public unless the print of the film has been stamped, in accordance with this Act to show the classification assigned to the film."<sup>74</sup> Section 77 provides an exception to the norm, "The Regie may, on such conditions as it may determine, issue a special authorization permitting the films it indicates to be exhibited to the public at a diplomatic event, a festival or any other similar event."<sup>75</sup>

The powers of the Regie du Cinema are set out in s.81, a marked departure from the statutory language of Ontario, British Columbia and Nova Scotia, "...the Regie, if of the opinion that the content of the film does not endanger public order or good morals, in particular, that it does not condone nor promote sexual violence, shall assign one of the three following classes to the film, according to the sector of the audience to which it is directed: (1) For all (2) 14

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<sup>74</sup> Quebec, Bill 109, Cinema Act 1983 Assented to June 23, 1983, yet to be proclaimed. Although the Cinema Act is not yet operative in Quebec, I have chosen to use it here as the best expression of the province's policy at the present time.

<sup>75</sup> Ibid, s.77.

and over, (3) 18 and over."<sup>76</sup> Quebec's Cinema Act requires that there be a demonstration of harmfulness, in the event of prohibition of public exhibition. While a classificatory scheme is used to regulate the potential offensiveness of the film medium, prohibition depends upon endangering morals or condoning or promoting sexual violence. The prevention of potential harm is at the heart of Quebec's control and supervision of the film medium, at least insofar as statutory language is concerned.

Nova Scotia's Theatres and Amusements Act<sup>77</sup> provides that, "The Board shall have power to permit or to prohibit (a) the use or exhibition in Nova Scotia or in any part or parts thereof for public entertainment of any film and (b) any performance in any theatre..." Section 1(g) of the Act defines performance as "...any theatrical, vaudeville, musical or moving picture performance or exhibition for public entertainment."<sup>78</sup> Categories of classification are general, adult accompaniment required if under 14, and admission restricted to those 18 or over. Recent regulations to the Theatres and Amusements Act provide for some control over the sales and rentals of "videofilm". Section 8 states, "Every film exchange shall indicate...to

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<sup>76</sup> Ibid, s.81.

<sup>77</sup> Revised Statutes of Nova Scotia, 1967, Theatres and Amusements Act, C. 304.

<sup>78</sup> Ibid, s. 1(G).

its customers the classification and captions, if any, given to the film by the Board and where the film has not been classified, it shall be indicated as unclassified."<sup>79</sup> While there is no intention here to compel video distributors to submit their tapes for classification, the section does require that the Nova Scotian consumer be better informed regarding the status of any given "videocassette, videodisc, or videotape."

The thorny issue of jurisdictional control over home video appears to be a matter of interest to all censor boards in the four provinces under study. While Ontario has served notice that it will move to both censor and classify videofilms for home use,<sup>80</sup> Quebec, Nova Scotia and British Columbia have yet to follow her lead. Of some importance here is a distinction between public and private entertainment. While motion picture theatres are the sources of publicly shared experiences, the private home is correspondingly the source of a private experience. The criminal process can already be invoked against the distributors of videofilm; the exercise of provincial jurisdiction here is arguably a costly duplication of a pre-existing mechanism of control.

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<sup>79</sup> Regulations Respecting Film Exchanges, Nova Scotia, 1984, pursuant to s.2(1) of the Theatres and Amusements Act, note 77, above, s.8.

<sup>80</sup> "Videotapes face censors in Ontario", The Globe and Mail, May 5, 1984 p.1.

And yet it is also difficult to separate the exhibition of film from the sales or rental of videofilm. Through classificatory categories and written warnings, the province may wish to limit circumstances of exposure to potentially offensive videofilm; Nova Scotia's Regulations Respecting Film Exchanges<sup>81</sup> seem to be a measured step in this direction.

But it is difficult to assert the value of different standards for prohibition. The issue that requires debate can be put simply enough: should a consenting adult be permitted to view material at home that could not be shown, to him or her in a theatre, at a price? Provincial prohibition has often been objected to on the ground of jurisdictional purity - that censorship occupies the federal territory surveyed by s.159(8) of the Code. Indeed, the decision to prohibit public access is essentially the decision made upon criminal conviction; some form of display in the public domain is a prerequisite for the invocation of the court process.<sup>82</sup>

The confusion here stems, I think, from a limited analysis of federal and provincial roles and responsibilities concerning obscenity and censorship. The

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<sup>81</sup> See note 79, above.

<sup>82</sup> Private possession of obscene materials is not generally the target of the law as written. See, however, Re Hawkshaw and the Queen (1982) 69 C.C.C.(2d) 503 (Ont. C.A.)



provinces and the federal government both share responsibility for structuring the meaning of obscenity. The statutory language of s.159 and Supreme Court pronouncements concerning this offence are not so detailed as to suggest the province's plan of action in the individual case. As a consequence, crown counsel, regional crown counsel, and ultimately the province's Attorney-General must contribute both detail and substance to the meaning of obscenity.

There is no rigid demarcation of federal and provincial spheres of responsibility. And it is in this context that the prohibitive powers of provincial censor boards can best be appreciated. Were the boards not to possess the power of prohibition, obscenity would be more directly shaped by police interests, albeit within a federally established legislative and judicial framework. The repeal of provincial powers of censorship would eliminate the checks and balances now implicit in Censor Board-police relations.

And yet to speak only of jurisdiction here is to fail to reach the essence of Censor Board decision-making, in practice. The legislative specifics of censor board powers do not yield insight into the reasoning that is being employed in decisions to ban, to request eliminations, and to classify. Indeed, it is this appearance of arbitrariness that has concerned both the Ontario Divisional Court and the

Ontario Court of Appeal in Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors.<sup>83</sup>

Each of the four provincial Boards strives to insure some measure of community representativeness in procedures for screening films submitted. Ontario has fifteen appointed board members who view each film in five to seven person panels; majority verdict determines approval, eliminations, and classifications. It is said that "...members...represent a cross-section of the community in age, philosophy, background, lifestyle and ethnic origin."<sup>84</sup> Over 7,500 Ontarians were contacted by Board members in 1982-83; assessments of community sentiment are presented at quarterly meetings of the full Board.

In Nova Scotia a similar kind of model prevails. The province has 9 board members who view each film in four person panels. Chairman Don Trivett notes that members are appointed to the Board in accordance with the principle of community representativeness. There exists a diversity of opinion among Board members, though decision-making stresses consensus as opposed to majority verdict.<sup>85</sup> With censorship

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<sup>83</sup> See Re, Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 1, above, and Ontario Court of Appeal decision, February, 1984, unreported.

<sup>84</sup> See note 73, above, at 13.

<sup>85</sup> With both consensus and majority verdicts, there is nonetheless a shared tolerance with respect to the decisions made; continued involvement in the process requires this much.

or classification issues that may be controversial or difficult, the full Board may sit as a panel.

In British Columbia Board members are again appointed, although all three classifiers have full-time appointments; in Nova Scotia eight of nine board members are part-time appointees, in Ontario 12 of 15 are part-time appointees, in Quebec three of six. In most instances all three B.C. classifiers see each film; the model of decision-making is again one that stresses consensus, as opposed to majority verdict. While disagreements are said to occur with approximately 10 per cent of classification decisions, a single statement of position ultimately emerges from the Branch.

Quebec's Bureau de Surveillance du Cinema has six appointed members. A jury of two screens each film. Three conditions must be met by members of the Board, a university degree in humanities or the social sciences, a passion for the cinema, and an involvement in community activities.<sup>86</sup> Again, as in British Columbia, and Nova Scotia, a consensus model of decision-making is predominant. In the event of disagreement over a film, there may be a 24 hour delay, but ultimately a single position will be taken; a third member may also screen the film and work toward consensus. The

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<sup>86</sup> Personal conversation, Jean Tellier, Bureau de Surveillance du Cinema, Quebec, April, 1984.

Regie du Cinema will leave present practice largely undisturbed; there is little reason to believe that the Cinema Act will herald marked departures from the status quo.

In all provinces Censor Board process gives some degree of importance to the issue of community standards, but the notion remains problematic. Market Facts data reveal that over 60 per cent of Ontario's adults believe that films with explicit sexual intercourse should be prohibited; 49 per cent believe that the use of vulgar or profane language must be prohibited.<sup>87</sup> At the same time the data indicate that only 7 per cent of Ontarians are concerned about sex in movies.

There is a need to examine more closely the targets of prohibition; the community standards test does not, in itself, furnish the state, be it provincial or federal, with an adequate justification or explanation for prohibition.

Ontario, Quebec, B.C. and Nova Scotia draw markedly different boundaries in making judgements to prohibit, eliminate, and classify the public exhibition of film.

Tables I through IV set out available data on the operations of the four boards. While there is little consistency in record-keeping across the provinces, the figures here do contribute, albeit modestly, to an

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<sup>87</sup> See note 65, above, at 19.



understanding of our processes of censorship and classification.

Comparison is difficult. I have tried to focus on feature length 35 and 16 MM films in each province, excepting short subjects, trailers and the like; the feature film is essentially the target of public scrutiny. A lack of uniform data collection complicates and limits this attempt. Given coverage of different periods of time in different provinces, and changes over time in bases of comparison, interpretation of these figures must be very circumscribed.\*\*

Nonetheless, there are patterns here that bear consideration. It seems clear that all provinces have experienced modest declines in the number of films screened over the past few years; the size of each Board's operation is also reflected in the figures cited. The province of Nova Scotia processes one film for every four processed by Ontario; British Columbia and Quebec fall between, with the latter province closer to Ontario's numbers. It also seems that in B.C. and Ontario over the past few years, there have been significant increases in the absolute number of eliminations and rejections of film by provincial censor boards.

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\*\* It is not presumed that there is any comparison of equivalent bases of data in Tables I to IV; the necessity of provincial autonomy precludes such analysis.



TABLE I: FEATURE FILMS, BRITISH COLUMBIA

<u>No.</u>	<u>Films Screened</u>	<u>Films with Eliminations</u>	<u>Films Rejected</u>
1979	764	45	3
1980	672	14	3
1981	580	18	3
1982	561	21	2
1983	531	89	1

TABLE II: FEATURE FILMS, ONTARIO

<u>No.</u>	<u>Films Screened</u>	<u>Films with Eliminations</u>	<u>Films Rejected</u>
1978-79	1060	146	4
79-80	1339	141	4
80-81	1154	58 (35 mm only)	5
81-82	1112	82 (35 mm only)	46
82-83	1050	109 (35 mm only)	46 (35 mm only)

TABLE III: FEATURE FILMS, NOVA SCOTIA

<u>No.</u>	<u>Films Screened</u>	<u>Films with Eliminations</u>	<u>Films Rejected</u>
1977-78	468	Not available	Not available
78-79	382	Not available	Not available
79-80	283	Not available	Not available
80-81	247	Not available	Not available
81-82	256	Not available	Not available

TABLE IV: DES LONG METRAGES\*, QUEBEC

<u>No.</u>	<u>Films Screened</u>
1978-79	890
79-80	841
80-81	970
81-82	910
82-83	868

\*Data concerning eliminations and rejections not available.

But it is here that the existing data must be placed alongside the reality of existing practice. Provincial thresholds of tolerance vary considerably. Of primary importance to those of us interested in the spheres of federal and provincial responsibility for obscenity and censorship, is the question of prohibition.

It must be stressed first that film distributors exercise a substantial degree of self-censorship. The distributors are sensitive to the parameters of each Board's policies; different versions of the same film are sent to Boards of different sympathies; some films are simply not considered for a general release to all provinces.

Ontario's Director, Mary Brown, has indicated that "very graphic or prolonged scenes of violence, torture, bloodletting; explicit portrayal of sexual violence, explicit portrayal of sexual activity, undue or prolonged emphasis on genitalia and ill treatment of animals would normally be considered to contravene community standards and are scenes for which eliminations would normally be requested."<sup>89</sup>

The Director and Chairman of the Board of Censors since 1980, Mrs. Brown rejects the notion that explicit sexuality can be tolerated as public entertainment, breaking here with -----

<sup>89</sup> Theatres Branch Annual Report, note 73, above, at 15.

her colleagues in British Columbia and Quebec.

Mrs. Brown's major concerns rest, nonetheless, with sexuality and children and with both violence and sexual violence. Study of requested eliminations reveals that sexuality and violence are seen as independently problematic. The Elimination Report of January 1984 gives some sense of what Ontario prohibits; the Board issued the following instructions in six different films.

"Eliminate cutting of man's neck with knife; Establish and shorten scene of axe being used to hack bodies of man and women; Eliminate all views of copulation scene in which hips are visible and in motion; Eliminate closeup of erect penis with a condom being rolled on; Eliminate scene of tongue in rectum; Eliminate scene of spreading buttocks revealing rectum; Eliminate scene of prolonged close-up of penis; Eliminate scene of men being spanked on bare buttocks; Eliminate graphic scene of mouth-nose at rectum." 90

British Columbia's standard for prohibition similarly flows from concerns about images of sexuality and violence. Monthly reports reveal, however, that "penetration", "ejaculation" and "violence" are the stated variables of concern. Director Mary Louise McCausland, a member of the

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90 Theatres Branch Elimination Report, January 1984, Ministry of Consumer and Commercial Relations, Ontario.

Branch since 1976 and Director from 1978, suggests that these variables represent a kind of balancing of community tolerance. The Branch had been in the process of gradually allowing explicit sexuality between consenting adults, but became sensitive to adverse public reaction concerning the film *Caligula*. As a consequence of this reaction the Board has ultimately adopted a rather unique policy, permitting explicit scenes of both fellatio and cunnilingus, while prohibiting scenes involving penetration or ejaculation. The monthly report of eliminations for April of 1984 indicates that 14 of 17 films were cut as a consequence of either penetration or ejaculation or both; three of the 17 films contained unacceptable violence.<sup>91</sup>

Nova Scotia's Amusements Regulation Board notes that, "The rejection of a film may occur when there is no real story but prolonged explicit portrayal of sexual activity, sexual exploitation of children, undue and prolonged scenes of violence, torture, bloodletting, ill treatment of animals, undue or prolonged emphasis on genitalia."<sup>92</sup>

The province follows Ontario's example in not allowing explicit sexual activity as a form of public entertainment.

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<sup>91</sup> Eliminations, April, 1984, Film Classification Branch, British Columbia.

<sup>92</sup> Classification Parameters, 1984, Amusements Regulation Board, Nova Scotia.

Board Chairman Don Trivett notes that Nova Scotia is a smaller and somewhat more conservative province than Ontario, Quebec, or British Columbia; the community standard of tolerance correspondingly reflects these structural differences. Unlike British Columbia and Ontario, Nova Scotia does not provide the public with a statement of reasons for decisions concerning eliminations or rejections. The Amusements Regulation Board and the Department of Consumer Affairs suggest that their above-noted statement of policy regarding rejections yields sufficient detail.

The core of Quebec's Bureau de Surveillance du Cinema has remained largely unchanged over the past twenty years. Andre Guerin, Pierre Saucier, and Jean Tellier form the backbone of the organization. While Quebec, like Nova Scotia, does not provide a public statement of reasons for rejection of a film, the Bureau is quite candid about its decisions regarding prohibition. Explicit sexuality between consenting adults is viewed as an acceptable or tolerable form of public entertainment; sexuality, per se, is not a target for elimination. Jean Tellier notes that images viewed as intolerable are those of sexual violence, within the genre of the "sexploitation" film. M. Tellier stresses that the Bureau must also be sensitive to the shifting nature of community standards, that specific and inflexible criteria are simply not realistic. Unlike British Columbia,



Quebec allows the presentation of films containing penetration and ejaculation. The Bureau does not keep statistics regarding eliminations or rejections, arguing that the figures would be meaningless. A film may be rejected several times before ultimate acceptance; the number of rejections would then say little about Bureau policy. Jean Tellier stresses that the Bureau does not request specific cuts-that decisions regarding elimination are those of the film distributor.

These portraits of provincial standards for prohibition raise a number of interesting issues. All provinces are very much bound by the notion of a community standard of tolerance and yet there is no systematic taking of the public pulse, excepting Ontario's Market Facts survey of 1979. The data there suggested that a majority of Ontario's adults would not tolerate explicit sexuality as public entertainment. Insofar as the Board's role is only to reflect majority will, its present eliminations appear as a sensitive reading of community sentiment.

And yet it is difficult to properly situate the role of community tolerance. Though the expression presumes a consensus of views within provincial boundaries, Ontario's survey confirms that there is no single definition of tolerance among adult residents. The issue can also be understood in terms of the notion of a critical mass. The

more urbanized areas or Canada are tolerating, or have a demand for, routinized exposure to pornographic film. Were Nova Scotia to assent to public exhibition of explicit sexuality, such a step might well encounter staunch resistance, the issue of harm notwithstanding; there is an understandable concern that the Amusements Regulation Board not act to create public controversy. We cannot dismiss the importance of community sentiment as a variable of significance in decisions to prohibit public exhibitions of film. The creation of a community tolerance test remains problematic, but the often guiding hand of public reaction must be acknowledged.

In this light, the issue of censor board accountability can be most fairly raised. The public ought to be able to discover what has been eliminated from a film, and why.<sup>93</sup> With both a test of harmfulness and a test of community tolerance, the public right to know persists. Ontario and British Columbia's policies of public access are models to be emulated in this respect. Indeed, Ontario's presentation of policy is particularly explicit, precisely describing the scene to be eliminated. While Ontario's decisions, in themselves, are not above criticism, the province's public accountability does create a model for other jurisdictions. Quebec and Nova Scotia's present policies do not mandate

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<sup>93</sup> See Conclusion 5, below.

public accessibility to the decision-making process. Yet public regulation should carry a corresponding burden of public accountability; it seems reasonable to suggest the development of policy geared towards enhancing public scrutiny.<sup>94</sup> And yet neither Quebec nor Nova Scotia Boards are fairly criticized for failure to respond to concerns that the public may raise. Quebec's Bureau de Surveillance du Cinema has been critically acclaimed for its sensitive and thoughtful response to community concerns; Nova Scotia's Amusements Regulation Board similarly enjoys strong community support.

In the final analysis, though, provincial Boards are judged by their decisions in the individual case. The films Pretty Baby, Beau Pere, Caligula, and Not a Love Story are among the most controversial of our recent past. Table V indicates the manner in which the different boards responded to these features.<sup>95</sup> The comparisons inform us that different versions of film are indeed sent to different Boards and that considerable differences of opinion exist in the individual case. Interestingly, the film Not a Love

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<sup>94</sup> The concerns here are markedly similar to those raised by the Ontario Divisional Court and the Ontario Court of Appeal in Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 1, above, note 83, above.

<sup>95</sup> This chart has drawn on a report, Peter Petruzzellis, Compilation and Review of Notes, Theatre Branches Across Canada, September, 1982. The Petruzzellis Report compares the films Pretty Baby, Beau Pere, and Caligula.

TABLE V: PROVINCIAL RESPONSES TO SPECIFIC FEATURE FILMS

Film	B.C.	Ontario	Nova Scotia	Quebec
Pretty Baby	Approved	Not Approved	Approved	Approved
Beau Pere	Approved	Not Approved	Not Submitted	Approved
Caligula	Approved (American version)	Approved (British version with cuts)	Not Approved	Approved (American version with cuts)
Not a Love Story	Exempted	Not Approved for comm. use	Not Approved for comm. use	Approved

Story, a documentary on the exploitive character of pornography, contains explicit sex; one scene involves both fellatio and penetration. The film's intention permits this presentation. Both Ontario and Nova Scotia licensed the film for educational purposes. Ontario's Mary Brown noted in June of 1982,

"Although extensive use of hardcore footage prevented the general commercial release of Not a Love Story in Ontario, the Board approved the National Film Board's original marketing plan to distribute and to exhibit it

as an educational film."<sup>96</sup>

Ironically, that section of the public that might most benefit from this stimulating polemic is excluded, in such a formulation. Commercial release expands the available adult audience and hence the arguable utility of the film. While the concern here was undoubtedly that of not wanting to define explicit sex as entertainment, the judgement is difficult to follow. We return to the question of the appropriate target for prohibition, the heart of both provincial powers of censorship and the criminal control of obscenity.

#### Obscenity and Censorship: A Question of Focus

We must discuss the theoretical and practical parameters of obscenity and censorship; the context of present enforcement provides a valuable backdrop for informed analysis. Figure I presents us with an index of -----

<sup>96</sup> Letter to Dr. Robert Elgie, Minister of Consumer and Commercial Relations, June 21, 1982, from Mary Brown, Director, Theatres Branch, at p.3.



public concern about the criminal offence of obscenity. Although the data refer to the more general category of offences tending to corrupt public morals, discussions with a number of Crown counsel suggest that the overwhelming majority of charges relate to s. 159(8) of the Code. As a consequence, these police reports provide a good approximation of patterns of obscenity enforcement over the past nine years.<sup>97</sup>

Figure I reflects a recent increase in public concern about obscenity; in light of the current salience of the issue, one might well expect offences reported or known to the police to further increase in 1983 and 1984. Interestingly, Figure II reveals a significant decrease in the number of reported offences considered unfounded by the police; Figure III presents us with a picture of offences cleared - offences in which a prima facie case against a specific individual or business has been established, and either proceeded with, or abandoned for reasons unrelated to the sufficiency of the charge. In this instance we see consistent, if somewhat, moderate increases over the past five years.

Figure IV is perhaps our best index of control in the matter of obscenity; the past seven years have seen an

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<sup>97</sup> Relevant police data relating to "Offences Tending to Corrupt Public Morals" is not available prior to 1974.

Figure I  
Patterns of Enforcement: Offences  
Tending to Corrupt Public Morals,  
1974 to 1982, Canada  
Offences Reported or Known to Police

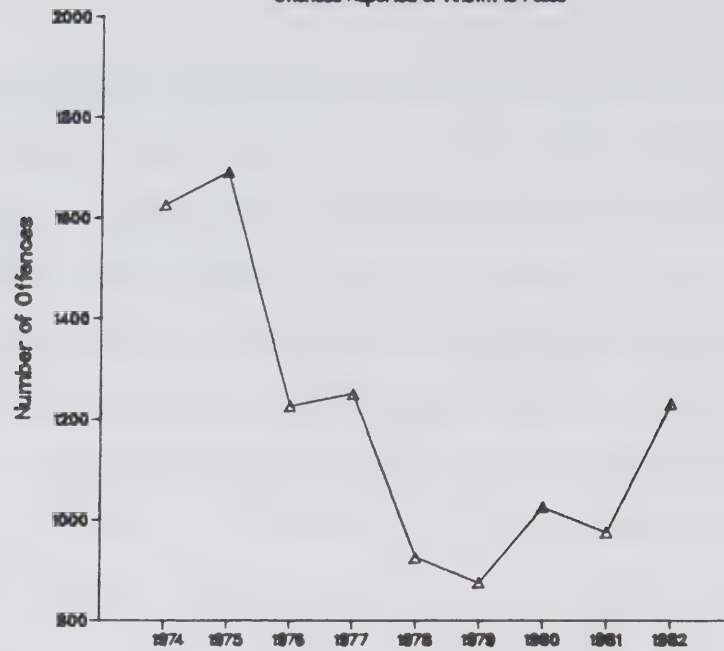


Figure II  
Patterns of Enforcement: Offences  
Tending to Corrupt Public Morals,  
1974 to 1982, Canada  
Offences Unfounded

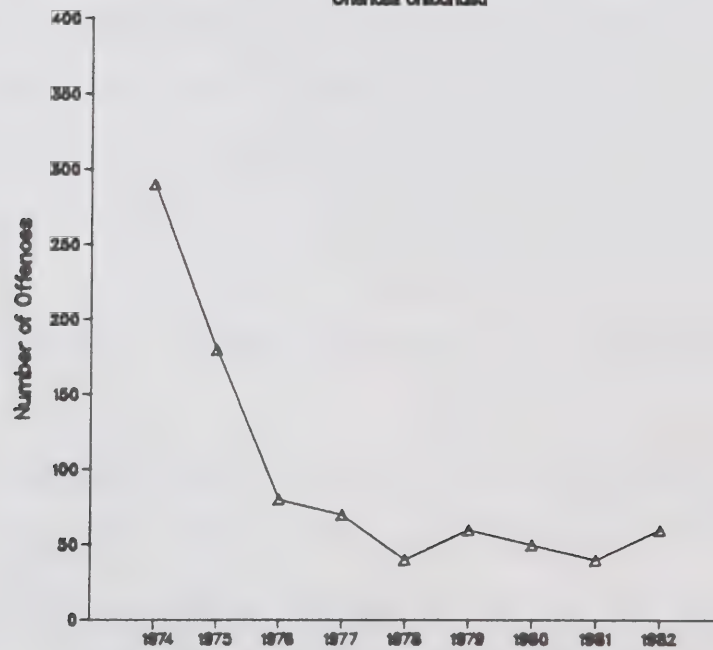


Figure II  
Patterns of Enforcement: Offences  
Tending to Corrupt Public Morals,  
1974 to 1982, Canada

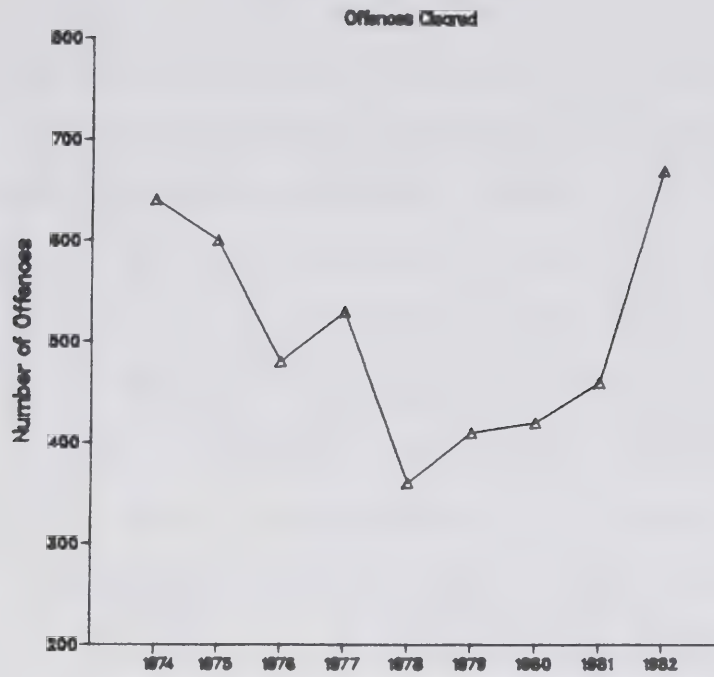
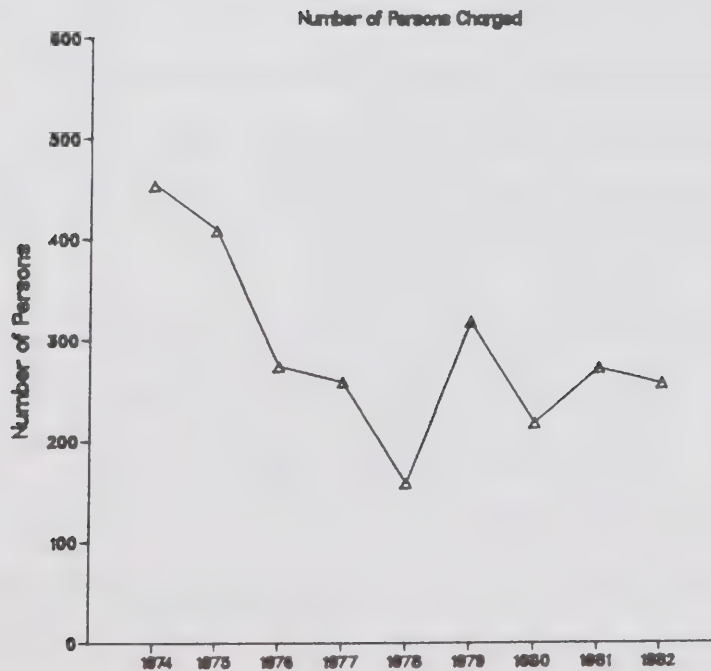


Figure IV  
Patterns of Enforcement: Offences tending  
Tending to Corrupt Public Morals,  
1974 to 1982, Canada



average of 200 to 250 Canadians charged each year with the offence. While an increasing centralization of the distribution of potentially obscene material might result in more offences and correspondingly fewer offenders, one must acknowledge here that in human terms the control of the offence has been relatively static for the past seven years. Figures V to XIV reveal that provincial control has not been similarly static. In Newfoundland, Prince Edward Island, New Brunswick, Nova Scotia and Saskatchewan, the number of persons charged has remained at a relatively minimal level over the past nine years. Ontario provides the lion's share of obscenity charges; over half of all Canadians charged are charged within that province. In 1982 Quebec, with a roughly approximate population, charged one person for every four charged in Ontario. Over the past three years, while the number of persons charged with obscenity has been steadily decreasing in Quebec, the number of persons charged in British Columbia and Manitoba has been consistently increasing.

These distinctive provincial patterns of criminal enforcement raise the question of a working relationship with powers of censorship and classification. Quebec and Ontario Boards have markedly different perceptions of community tolerance; it does not seem unreasonable to suggest that the greater tolerance of the Quebec Censor

Figure V  
Patterns of Enforcement: Persons charged  
with Offences Tending to Corrupt Public  
Morals, 1974 to 1982

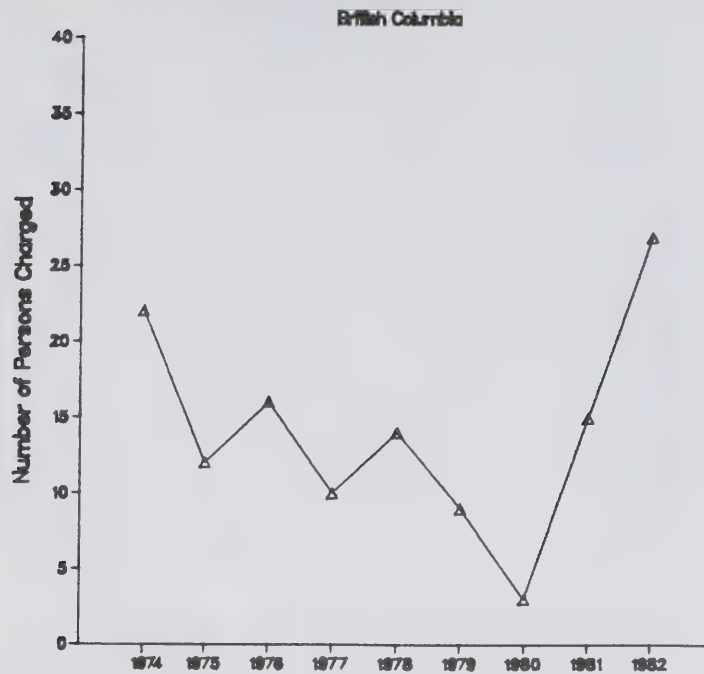


Figure VI  
Patterns of Enforcement: Persons charged  
with Offences Tending to Corrupt Public  
Morals, 1974 to 1982

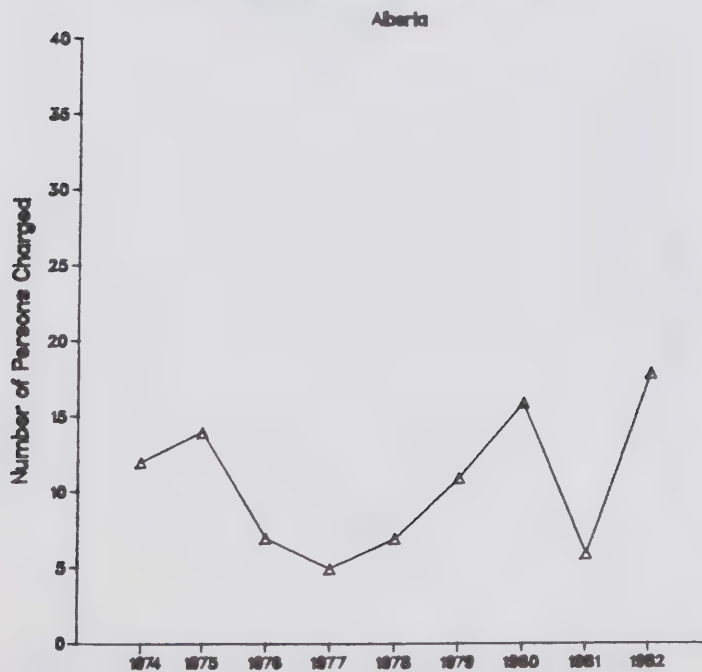




Figure VI  
Patterns of Enforcement: Persons charged  
with Offences Tending to Corrupt Public  
Morals, 1974 to 1982

Saskatchewan

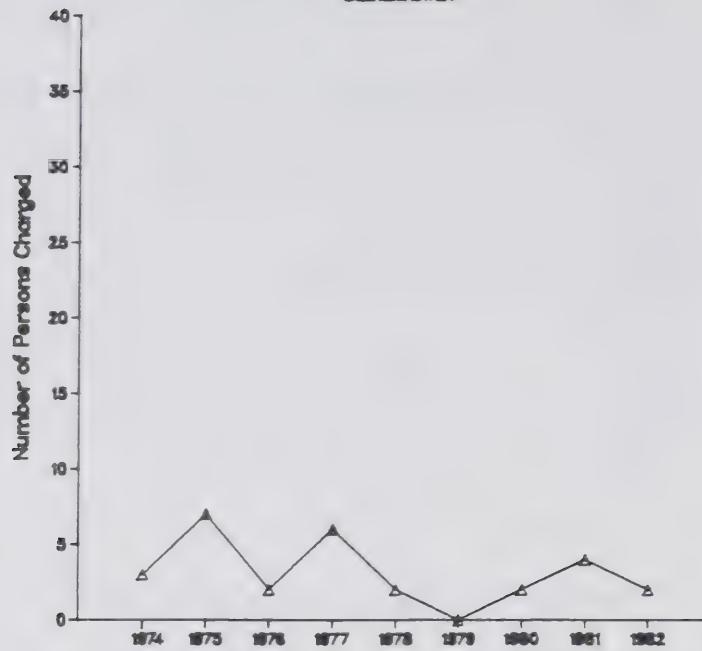


Figure VII  
Patterns of Enforcement: Persons charged  
with Offences Tending to Corrupt Public  
Morals, 1974 to 1982

Manitoba

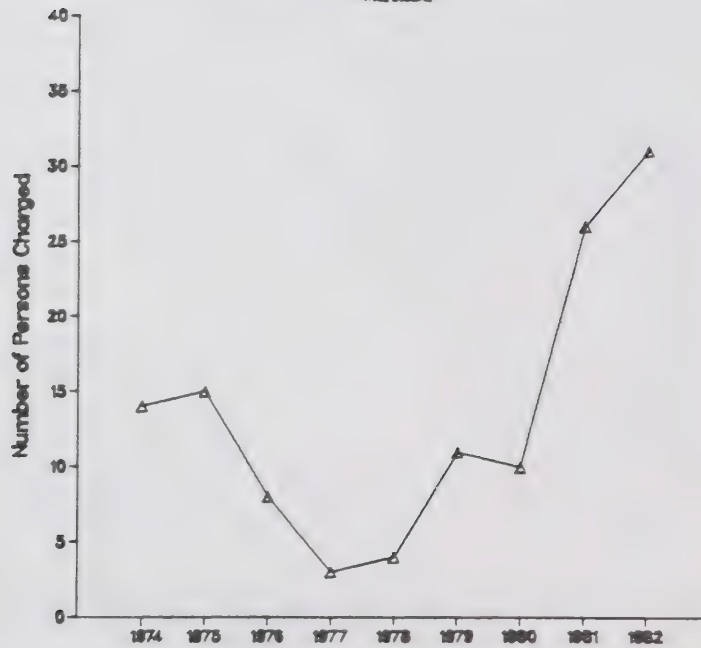


Figure IX  
Patterns of Enforcement: Persons charged  
with Offences Tending to Corrupt Public  
Morals, 1974 to 1982

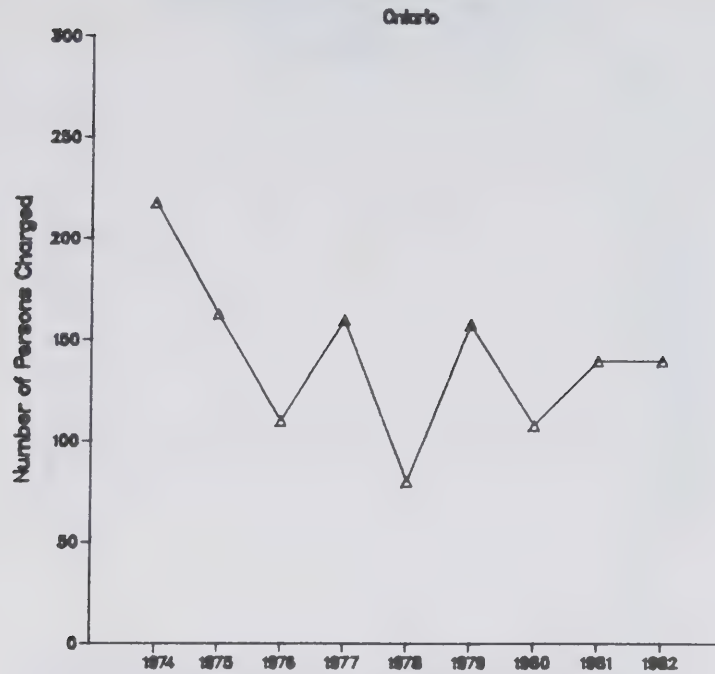


Figure X  
Patterns of Enforcement: Persons charged  
with Offences Tending to Corrupt Public  
Morals, 1974 to 1982

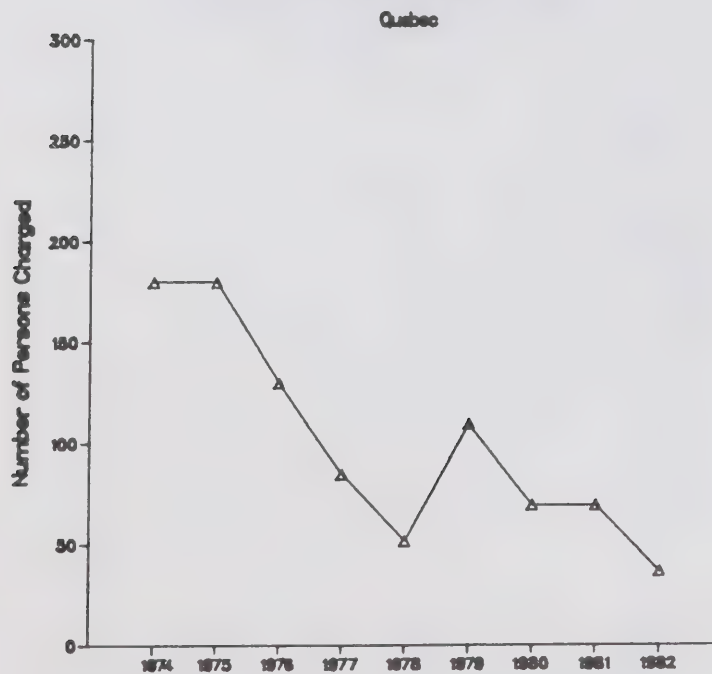


Figure X1  
Patterns of Enforcement: Persons charged  
with Offences Tending to Corrupt Public  
Morals, 1974 to 1982

New Brunswick

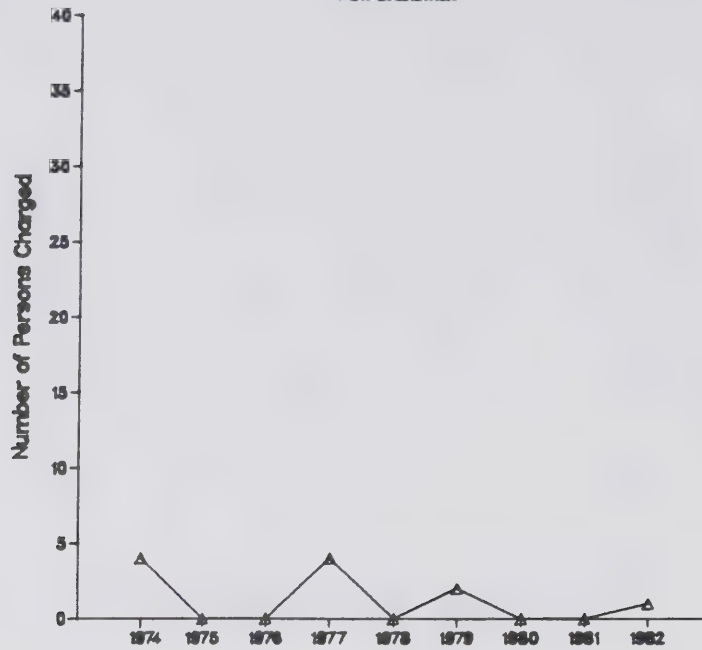


Figure X1  
Patterns of Enforcement: Persons charged  
with Offences Tending to Corrupt Public  
Morals, 1974 to 1982

Nova Scotia

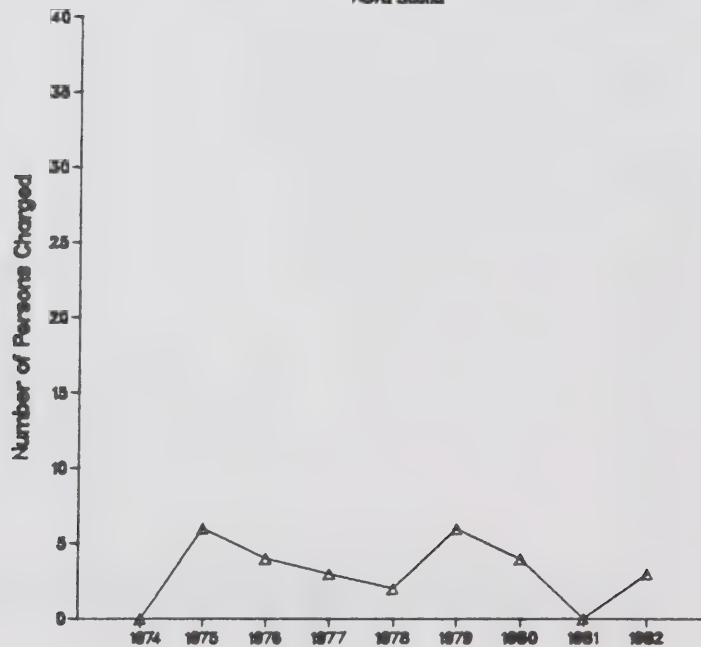


Figure XIII  
Patterns of Enforcement: Persons charged  
with Offences Tending to Corrupt Public  
Morals, 1974 to 1982

Prince Edward Island

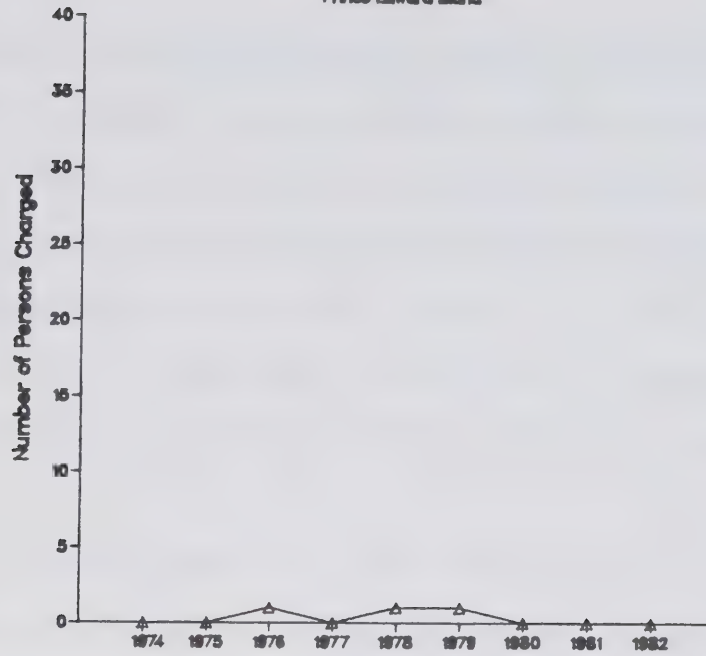
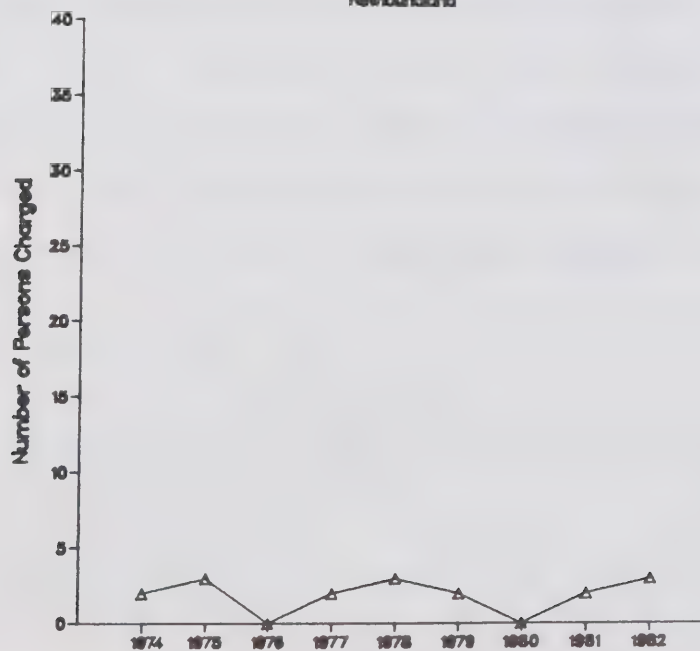


Figure XIV  
Patterns of Enforcement: Persons charged  
with Offences Tending to Corrupt Public  
Morals, 1974 to 1982

Newfoundland



Board is reflected in the decision-making of law enforcement personnel, police and Crown counsel. Ontario's more restrictive criteria appear to be similarly manifest in Ontario's greater tendency towards use of the criminal process. Provincial censor boards have significant roles both in structuring provincial patterns of enforcement and in providing a definitional context for s. 159(8) of the Code.

Court data concerning the criminal offence of obscenity are very limited. Table VI presents data from only parts of British Columbia and Quebec and only for the years 1978 to 1980.<sup>98</sup> Nonetheless, we receive a fairly clear picture of sentencing policy for the offence. A fine is almost invariably imposed upon conviction. The single imprisonment noted here is something of a puzzle. Nadin-Davis and Sproule do not provide us with any practical possibility of an imprisonment option in their Canadian Sentencing Digest;<sup>99</sup>

although the option does exist, it is very difficult to find judicial support for this response. A financial penalty typically appears as the state's symbolic response

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<sup>98</sup> M.J. Parlor, Senior Analyst, Courts Program, of the Canadian Centre for Justice Statistics writes, "It must be emphasized that there are severe methodological problems with the data. In particular, the limited coverage (which varies by year), the completeness of reporting, and the different sampling methods are all matters of concern".

<sup>99</sup> R.P. Nadin-Davis and C.B. Sproule, Canadian Sentencing Digest, Toronto, Carswell, 1982, 39-1, 39-2.



to the offender. In R. v. Ariadne Devs. Ltd.,<sup>100</sup> the Nova Scotia Court of Appeal reduced the accused corporation's fine from \$12,500 to \$7,500, arguing that this latter amount represented one year's profits and as such constituted an adequate deterrent.

The criminal enforcement of obscenity does not appear to be a particularly large enterprise of control. Less than 300 Canadians are charged each year with the offence; those convicted are invariably fined for their conduct. And yet pornography, obscenity, and censorship remain as salient public issues; recent decisions in Re Ontario Film and Video Appreciation Society and Ontario Board of Censors,<sup>101</sup> Re Nova Scotia Board of Censors et al. and McNeil,<sup>102</sup> R. v. Red Hot Video Ltd.,<sup>103</sup> and R. v. Doug Rankine Company Ltd and Act III Video Productions Ltd.<sup>104</sup> have served to sharpen our current focus.

Of particular interest to federal-provincial dialogue regarding obscenity and censorship are the recent decisions of the Ontario Divisional Court and the Ontario Court of

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<sup>100</sup> R. v. Ariadne Devs. Ltd., (1974) 19 C.C.C. (2d) 49 (N.S.C.A.)

<sup>101</sup> Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 1, note 83, above.

<sup>102</sup> Re Nova Scotia Board of Censors et al. and McNeil, note 23, above.

<sup>103</sup> R. v. Red Hot Video, note 1, above.

<sup>104</sup> R. v. Doug Rankine Company Ltd. and Act III Video Productions Ltd., Borins, C. Ct. J., (1984) 9 C.C.C. (3d) 53.

TABLE VI                    Sentences, s.159, 1973-80

	Convictions	Fine	Probation	Imprisonment
1978	22	20	2	0
1979	26	23	2	1
1980	22	22	0	0
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Total	70	65	4	1
	-----	-----	-----	-----

Appeal in Re Ontario Film and Video Appreciation Society and Ontario Board of Censors. The Film and Video Appreciation Society contended that certain sections of Ontario's Theatres Act contravened The Charter of Rights and Freedoms, in arbitrarily restricting freedom of expression.

The Divisional Court agreed, suggesting that while the provincial power of censorship has constitutional validity, Ontario's present legislative framework grants too much discretionary power to its Board. The court noted

"...we (do not) find that sections 3, 35 and 38 are invalid but the problem is that standing alone they cannot be used to censor or prohibit the exhibition of films because they are so general, and because the detailed criteria employed in the process are not

prescribed by law."<sup>105</sup>

The court added that the sections in question,

"...may be rendered operable by the passage of regulations pursuant to the legislative authority or by the enactment of statutory amendments, imposing reasonable limits and standards."<sup>106</sup>

The decision of the Divisional Court implies no criticism of the actual criteria used by the Ontario Censor Board, in prohibiting public exhibition of film. The court notes,

"As to whether the Standards issued by the Board of Censors would be considered to be reasonable limits, we express no views. They may or may not be acceptable, but in the light of the position we take on the next issue, it is not necessary for us to express a view. One thing is sure, however; our courts will exercise considerable restraint in declaring legislative enactments, whether they be statutory or regulatory, to be unreasonable."<sup>107</sup>

This last statement of principle by the Divisional Court was not endorsed by the Ontario Court of Appeal. While the Court of Appeal upheld the Divisional Court's

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<sup>105</sup> Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 1, above, at 87.

<sup>106</sup> Ibid, p.67.

<sup>107</sup> Ibid, p.65.

ruling, it took issue with the notion that the judiciary ought to exercise "considerable restraint" in examining the reasonableness of legislative enactments. The Court noted,

"We do not think, if they were purporting to enunciate a principle, that there is any such principle to be applied in the determination of what is "reasonable" under s. 1 of the Charter. In approaching the question, there is no presumption for or against the legislation..."<sup>108</sup>

The practical effects of the Ontario Court of Appeal decision are twofold. First, all provinces must give serious consideration to drafting statutory or regulatory guidelines for censorship and classification; in the event that the Supreme Court of Canada upholds the decision of the Ontario Court of Appeal, such legislation would appear to be a necessary provincial response. Second, the Court of Appeal's decision makes clear that the standards of prohibition and classification may continue to be a subject of judicial scrutiny, a more detailed legislative framework notwithstanding. The appropriate role for the province's censors and classifiers remains a subject in the process of judicial debate.

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<sup>108</sup> Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 83, above, at 4.

The Supreme Court's most important pronouncement to date on the subject of provincial censorship has been Re Nova Scotia Board of Censors et al. and McNeil. The Court held that while one regulation respecting the prohibition of indecent theatrical performances was beyond the jurisdiction of the province, the legal structure of Nova Scotia's approach to film censorship was properly within the provincial sphere. The Nova Scotia Board's censorship of Last Tango in Paris prompted this constitutional wrangle. It was argued that the power of censorship itself is beyond provincial jurisdiction, that it is an exercise of the federal criminal law power embodied in s. 159 of the Code.

Ritchie, J., speaking for the majority in McNeil, noted,

"There is, in my view, no constitutional barrier preventing the Board from rejecting a film for exhibition in Nova Scotia on the sole ground that it fails to conform to standards of morality which the Board itself has fixed, notwithstanding the fact that the film is not offensive to any provision of the Criminal Code."<sup>109</sup>

The majority suggests, then, that different standards of prohibition for the provinces and the federal government can

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<sup>109</sup> Re Nova Scotia Board of Censors et al. and McNeil, note 13, above, at 24.



be seen as constitutionally valid. Ritchie, J. adds,

"...there is no constitutional reason why a prosecution cannot be brought under s. 163 of the Criminal Code in respect of the exhibition of a film which the Board of Censors has approved as conforming to its standards of propriety."<sup>110</sup>

Ultimately Justice Ritchie rests the constitutional validity of provincial censorship on ss. 92(13) and 92(16) of the B.N.A. Act, noting that the Board's legal framework is concerned with "property and civil rights" and "matters of a local and private nature."

Laskin's dissent in McNeil takes a markedly different course. The former Chief Justice argues that the power of provincial censorship in Nova Scotia is not rooted in provincial jurisdiction. He notes,

"...the Board is asserting authority to protect public morals, to safeguard the public from exposure to films, to ideas and images in films, that it regards as morally offensive, as indecent, probably as obscene. The determination of what is decent or indecent or obscene in conduct or in a publication, what is morally fit for public viewing, whether in film, in art or in a live performance is, as such, within the exclusive power of the Parliament of Canada under its enumerated authority

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<sup>110</sup> Ibid, p.24.

to legislate in relation to the criminal law."<sup>111</sup>

The implications of the McNeil decision are somewhat confusing, clouded by a slim 5-4 majority verdict. There would seem to be a strong minority doubt about the validity of the provincial power of censorship, in itself. It is not clear that a future Court will ultimately accede to the view that the provinces' prior restraint of the medium of film is constitutionally permissible. Nonetheless, the majority decision in McNeil upholds provincial powers of censorship and classification. Section 37 of the recently introduced Bill C-19 would also seem to give implicit recognition to provincial autonomy in the matters of censorship and classification. The section requires that any criminal prosecution of a provincially classified film cannot proceed,

"...without the personal consent of the Attorney General."<sup>112</sup>

A challenge to the prohibitive standard of the provincial Censor Board is posited as an exceptional circumstance; the interlocking roles of federal and provincial jurisdictions are being stressed here.

But it is not only the provincial power of censorship that is under scrutiny in Canadian courts. In R. v. Red

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<sup>111</sup> Ibid, p.14.

<sup>112</sup> Canada, House of Commons, Bill C-19, Criminal Law Reform Act, 1984, ss.36,37.

Hot Video, counsel for the accused argued that the Code's obscenity provisions contravene s.2(b) and s.7 of the Charter, the right of freedom of expression and the right to "life, liberty and security of the person." Collins, Prov. Ct.J. held,

"...the Crown has established that the provisions of ss. (1)(a) and (8) of s.159 constitute reasonable limits as can be demonstrably justified in a free and democratic society."<sup>113</sup>

Collins suggested,

"...there appears to be some uncertainty as to how to determine what is or is not obscene. Whatever may be the cause of this uncertainty, it does not, in my view, result from a lack of clarity in the law. I think the law is sufficiently clear for that well-intentioned citizen that learned defence counsel speak of."<sup>114</sup>

And yet one must acknowledge that the appropriate targets of prohibition remain a matter of debate, jurisdictional and constitutional argument notwithstanding. In R. v. Doug Rankine Co. Ltd. and Act III Video Productions, County Court Judge Stephen Borins has made an attempt to address this issue specifically, setting out a new focus for judicial analysis. In deciding that certain

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<sup>113</sup> R. v. Red Hot Video, note 1, above, at 353.

<sup>114</sup> Ibid, p. 353.

films could not fairly be called obscene, Borins notes, "All of the films contain what the Crown described as "standard, run of the mill scenes" of sexual intercourse. In my opinion, contemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse. Contemporary community standards would also tolerate the distribution of films which consist of scenes of group sex, lesbianism, fellatio, cunnilingus, and anal sex. However, films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed, exceed the level of community tolerance".<sup>115</sup> While Borins found non-coercive explicit sexuality to be "artless", "insipid" and "boring", he did not find it deserving of prohibition.

The judgement in R. v. Doug Rankine is a reminder that the judiciary is ultimately sensitive to arguments regarding the purpose of prohibition. While the test of community tolerance is set out here and is determinative of the issue in dispute, it is the focus given sexual violence that is

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<sup>115</sup> R. v. Doug Rankine Company Ltd. and Act III Video Productions Ltd., note 104, above, at 163.

most instructive.

The past decade has seen a refocussing of public concern about obscenity and censorship. The issue of public harm is beginning to displace the issue of public morality; it is now sexual violence that highlights our agenda. At the centre of much controversy are two American-based social psychologists, Neil Malamuth and Ed Donnerstein. Their laboratory and field research redirects our attention from the notion of community tolerance to the issue of pornography's social costs.

The task of obtaining sound empirical research concerning the social costs of pornography has long been problematic. The subjects of study have changed over time; the concerns of the early seventies differ from those of today, and from those of the post War period. The 1970 President's Commission on Obscenity and Pornography<sup>116</sup> correspondingly differs in its emphasis from Britain's Williams Report of 1979, the latter perhaps being better related to our present circumstances. A 1973 volume of the Journal of Social Issues featured "pornography"--articles that spoke of "consumers of erotica", "explicit sexual materials", and "erotic films". There was no suggestion that the topic under study was that of images of sexual

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<sup>116</sup> Technical Reports of the Commission on Obscenity and Pornography, Washington, D.C., U.S. Government Printing Office, 1971.



violence, the focus of current concerns.<sup>117</sup>

In a 1982 review article,<sup>118</sup> Malamuth and Donnerstein set out the specifics of recent research regarding aggressive pornography. In a book chapter now in press, Donnerstein writes, "it is the aggressive content of pornography which is the main contributor to violence against women...when we take out the sexual content from such films and just leave the aggressive aspect we find a similar pattern of aggression and asocial attitudes. ...The problem here is what we mean by pornography. Are we discussing just sexually explicit material? All the research to date would not suggest any harmful effects from such exposure."<sup>119</sup>

This is a theme echoed by E.C. Nelson in his comprehensive, *Pornography and Sexual Aggression*. Nelson writes, "...research continues to emphasize the usefulness of discriminating between the effects of aggressive vs. non-aggressive sexual materials".<sup>120</sup> Nelson further remarks that, "...even now it is reasonably clear that observing violent sexuality can facilitate aggression in the observer

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<sup>117</sup> "Pornography: Attitudes, Use, and Effects", 29(3) Journal of Social Issues, 1973, 1 - 227.

<sup>118</sup> Malamuth and Donnerstein, note 53, above.

<sup>119</sup> E. Donnerstein, "Pornography: Its Effect on Violence Against Women", in N. Malamuth and E. Donnerstein, Pornography and Sexual Aggression, New York, Academic Press, in press, p. 32.

<sup>120</sup> E.C. Nelson, note 53, above, at 236.

- altering the context in which aggression is viewed does not appear to change anything".<sup>121</sup> The ability of the image to impact upon the reality of social relations seems well established. Nelson aptly describes this process, noting, "...the modelling of attitudes and behaviours which suggest that males are justified in their aggression toward females undoubtedly influences some males to disregard women's communications of non-consent and reinforces their beliefs about the appropriateness of using force or intimidation to make a woman do whatever they want her to do."<sup>122</sup>

Social scientists, particularly social psychologists, are now looking to the aggressive content of sexuality, in both laboratory and field experiments. A recent study involved 104 male subjects in Manitoba. In an initial session, questionnaires were given out, one item asking about the likelihood that the subject himself would rape if "...he could be assured of not being caught and punished." A five point scale was presented, with point one representing "not at all likely" and point five representing "very likely." The subjects were then divided into high rape potential and low rape potential groups; 62 males reported a one, "not at all likely"; 42 males reported a two, or more, on the scale. The subjects then listened to

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<sup>121</sup> Ibid, p. 236.

<sup>122</sup> Ibid, p.234.

one of three tapes, a mutually consenting depiction of sexuality, a depiction of rape in which a first unwilling victim becomes sexually aroused, or a depiction of rape in which the victim abhors the assault, a "negative outcome".

Malamuth and Check measured both penile tumescence and self-reported arousal to these stimuli.<sup>123</sup> For both males with "high rape" and "low rape" potential, blood flow to the penis increased most markedly in the rape-positive outcome condition; men were generally more physiologically aroused by violent sexuality than by consenting sexuality; for those with high rape potential, the effect was particularly pronounced. In the case of reported sexual arousal, those with high rape potential indicated that they were as excited by rape with victim abhorrence of assault as by sexuality with mutual consent.

The study does not present a flattering view of male sexuality. The predatory nature of the male finds expression in the fact that almost 50 percent of those sampled would consider sexually assaulting an unwilling woman, if no adverse consequences could be assured. There is a sense in which women have been commodified as objects for male satisfaction; the male often imagines stealing a woman in much the same way as the thief imagines stealing a

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<sup>123</sup> N. Malamuth and J.V.P. Check, "Aggressive-Pornography and Beliefs in Rape Myths: Individual Differences", unpublished manuscript, 1983.

bottle of scotch, or a colour television set. The breasts and the vagina are the valued goods, and the penis a willing weapon.

And yet, Malamuth, check, Donnerstein, and many others have been fairly criticized for what Thelma McCormack has has termed "Machismo in Media Research". McCormack notes that "... (a reasonable) research design would require subjects of both sexes, just as similar studies of racist content would include both black and white subjects. It is...significant that the experimental research on pornography has been carried out by men using almost exclusively male subjects."<sup>124</sup> McCormack also takes issue with the subject matter of much empirical effort to date. She argues for a conceptualization of pornography "...as an extreme form, almost a travesty, of sexual inequality in which women serve as sex objects to arouse and satisfy men and nothing more."<sup>125</sup>

In a field experiment Malamuth and Check have obtained, "...perhaps the strongest evidence to date to indicate that depictions of sexual aggression with positive consequences can adversely affect socially important perceptions and attitudes."<sup>126</sup>

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<sup>124</sup> T. McCormack, note 53, above at 553.

<sup>125</sup> Ibid, p.553.

<sup>126</sup> N. Malamuth and J.V.P. Check, "The effects of mass media exposure on acceptance of violence against women: A field experiment. 15 Journal of Research in Personality,



Some 270 subjects were shown either Swept Away and The Getaway, two commercially released feature films, or shown two neutral feature films. In Swept Away and The Getaway women are depicted as victims, within both sexual and non-sexual contexts. Questionnaires assessing acceptance of violence against women, rape myth acceptance, and belief in adversarial sexual relations were filled out several days after viewing. Comparisons between those who had seen Swept Away and The Getaway, and those who had seen neutral films revealed significant differences in expressed attitudes. Malamuth and Donnerstein note,

"Results indicated that exposure to films portraying aggressive sexuality as having positive consequences significantly increased male, but not female, subjects' acceptance of interpersonal violence against women and tended to increase males' acceptance of rape myths."<sup>127</sup>

Malamuth and Donnerstein inform us of the value of context in focusing our concerns. The depiction of sexual violence, in itself, cannot be objected to; it is the message of the depiction that requires evaluation. There seems to be little empirical evidence to establish the social harm embodied in allowing the exhibition of explicit

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<sup>126</sup>(cont'd) 436-446, 1981.

<sup>127</sup> Malamuth and Donnerstein, note 53, above, at 115.



sexual relations.<sup>128</sup> It is rather the potential condonation or promotion of sexual violence that is problematic. In pornography we see reflections of the reality of male-female relations, and a simultaneous structuring of expressed attitudes and potential for physiological arousal.

The debate concerning a causal link between the consumption of pornography and actual violence is not particularly crucial here. While it is certainly difficult to unequivocally establish such a causal connection,<sup>129</sup> the criminal sanction is adequately premised on indications of social harm. Insofar as a medium of communication condones or promotes sexual violence, or cruelty, it may fairly be said to be obscene, to be unsuitable for the public sphere. The images of film and those of other media have the power to impact upon male attitudes towards aggression against women and to positively reinforce coercive sexuality.

And yet the vagueness of the standard is a problematic. Sexual violence can be differentiated from the violence of the boxing ring or the hockey rink; there is no illusion here of the fair fight. But the condonation or promotion of sexual violence or cruelty remains a subjective test, with the rigid line of criminal conviction difficult to draw.

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<sup>128</sup> See E. Donnerstein, "Pornography: Its Effect on Violence Against Women", note 119, above.

<sup>129</sup> See, for example, B. Kutchinsky, Law, Pornography and Crime: The Danish Experience, London, Martin Robertson, 1978.

It is, nonetheless, an appropriate focus of concern. The provincial power to refuse public exhibition is not an inherently onerous limitation upon freedom of speech, and the criminal processing of obscenity will allow for debate on the legitimacy of what is potentially a kind of hate literature in the sexual sphere. Should guilt be established, only a financial penalty will typically be imposed. Sexuality in the private sphere is not a focus of control.<sup>130</sup>

Ultimately, though, the more general issue of sexuality and violence is probably best understood in public education and discussion. We must not forget that the images of controversy are very real reflections of social life. To the extent that males and females view each other simply as commodities to be obtained, they entrench a predatory conduct in interpersonal relations.

Images of sexuality and violence act as a barometer on the condition of human relations. As much a reflection of changing social structure as a social force, they do not comfortably succumb to black and white pronouncements. We place the pleasure of sexuality alongside the pains of dominance and exploitation, and we simply weave a tangled web.

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<sup>130</sup> For a case that espouses a somewhat contrary view see Re Hawkshaw and the Queen (1982), 69 C.C.C. (2d) 503 Ontario C.A.

### Conclusions

Implicit in the preceding pages are a number of conclusions concerning provincial powers of censorship and classification and federal obscenity provisions. These remarks are now made more explicit and will perhaps be of some assistance in Committee discussions.

1. The criminal definition of obscenity proposed in Bill C-19 could be further modified in the following manner.

s.159(8) For the purposes of this Act, any matter or thing is obscene where a dominant characteristic of the matter or thing is the undue exploitation of sexual violence or cruelty.

It is not clear that consenting sexuality between adults is properly the focus of the criminal law; it is not the "undue exploitation" of sexuality, but the "undue exploitation" of sexual violence that is revealed as problematic by empirical research. The subjects of crime and horror do not appear to be necessary inclusions in s.159(8); there are no judicial pronouncements concerning these terms; the field of objectionable material would appear to be adequately covered by the notions of sexual violence and cruelty.

The proposed addition to s.159(8), "through degrading representations of a male or female person or in any other manner", does direct our attention from the community tolerance test towards some conception of

social harm. Nonetheless, the language here does not suggest the images deserving of criminalization. There is a sense in which many television commercials degrade both men and women, and yet the criminal sanction would scarcely be appropriate. The phrase "degrading representation" does not give any kind of focus to the judiciary; it is fairly criticized for its vagueness.

It should be noted that "sexual violence", as defined above, incorporates the two prohibitions of the Williams Report.

Material whose production appears to the court to have involved the exploitation for sexual purposes of any person, where either (a) that person appears from the evidence as a whole to have been at the relevant time under the age of sixteen years; or (b) the material gives reason to believe that actual physical harm was inflicted on that person.<sup>131</sup>

2. The proposed s.163.1 of the Code should be enacted in its present form:

"163.1 Where any film or videotape is presented, published or shown in accordance with a classification or rating established for films or videotapes pursuant to the law of the province in which the film or videotape is presented, published or shown, no proceeding shall be instituted under section 159 or 163 in respect of such presentation,

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<sup>131</sup> Report of the Committee on Obscenity and Film Censorship, note 2, above, at 161.

publication or showing or in respect of the possession of the film or videotape for any such purpose without the personal consent of the Attorney General."

The section highlights the value of Censor Board decision-making in the sphere of film censorship and classification. While the criminal process may still be invoked against a provincially classified film, it is set out here as an extraordinary circumstance, requiring "the personal consent of the Attorney General." The section raises the profile of any public conflict that may develop between law enforcement perceptions of obscenity and Censor Board perceptions of properly prohibited material. Insofar as this promotes a greater awareness of decision making processes in the public sphere, it can be seen as a progressive proposal.

3. Provincial Censor Boards should retain powers of both prohibition and classification. The statutory framework of s.159 and existing judicial pronouncements, while ultimately determinative of obscenity, are not sufficiently precise to suggest Board policy in the individual case. One must acknowledge, too, that provincial autonomy is an important value here - that provincial jurisdiction over "property and civil rights", and "matters of a local and private nature"



justifies intervention. The standard of community tolerance and the conception of harm may vary from province to province; it seems reasonable to honour these regional variations.

4. The spirit of the Ontario Court of Appeal decision in Re Ontario Film and Video Appreciation Society should be reflected in provincial legislation. Each censor board should set out its criteria for prohibition and classification in statutory or regulatory form. While the language employed may be difficult to construct, it seems important that section one of the Charter not be disregarded; the power of prohibition requires public justification.
5. Censor Board decision-making in the individual case should be accessible to the public. The reasons for elimination or rejection should be stated in written form, available for public scrutiny. There seems no reason to deny public access to a decision-making process undertaken in the public interest.
6. Censor board prohibition of the sales and rental of videofilms seems a costly and unnecessary expansion of provincial power. The criminal offence of obscenity should be able to adequately respond to this new medium of communication; the provinces have historically been concerned with the public exhibition of film.

While this provincial intrusion into a more private sphere does appear as inappropriate, some degree of regulation is, nevertheless, desirable. The operators of video outlets should be required to designate tapes reviewed by the province with the appropriate classification awarded. If the film has not been reviewed it should bear the label "unclassified". The consumer is thus better informed, and the distributor is made more aware of the legal context in which he or she is operating.

7. The standard of community tolerance does not create a sufficient basis for the prohibitions of the censor board or the criminal convictions of the court. While such tolerance is a variable that impacts upon the decision-making process, it ultimately raises more questions than it answers. If 60 percent of Ontario residents want to ban explicit sex, does prohibition follow? Is mere intolerance itself all that need be proven?

The prohibition of images of sexuality and violence is fairly based on some consideration of social harm. Quebec's new test of censorship, the condonation or promotion of sexual violence suggests a possible direction for case law. An author, publisher or film maker who condones or promotes sexual violence or

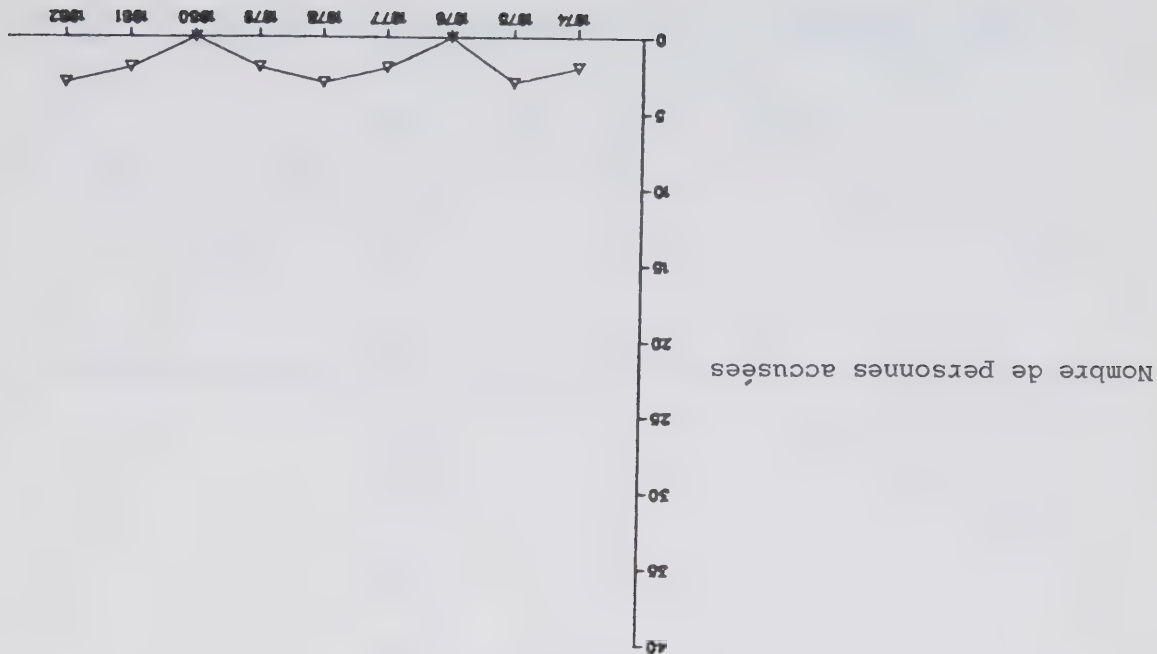
cruelty is not reasonably insulated from sanction, by claiming a legitimate right to freedom of speech. The recent decision of Borins, C.Ct.J. in R. v. Doug Rankine and Act III Video is also suggestive of a new direction in criminal control, the Court instructively drawing a line between the explicitly sexual and the sexually coercive.



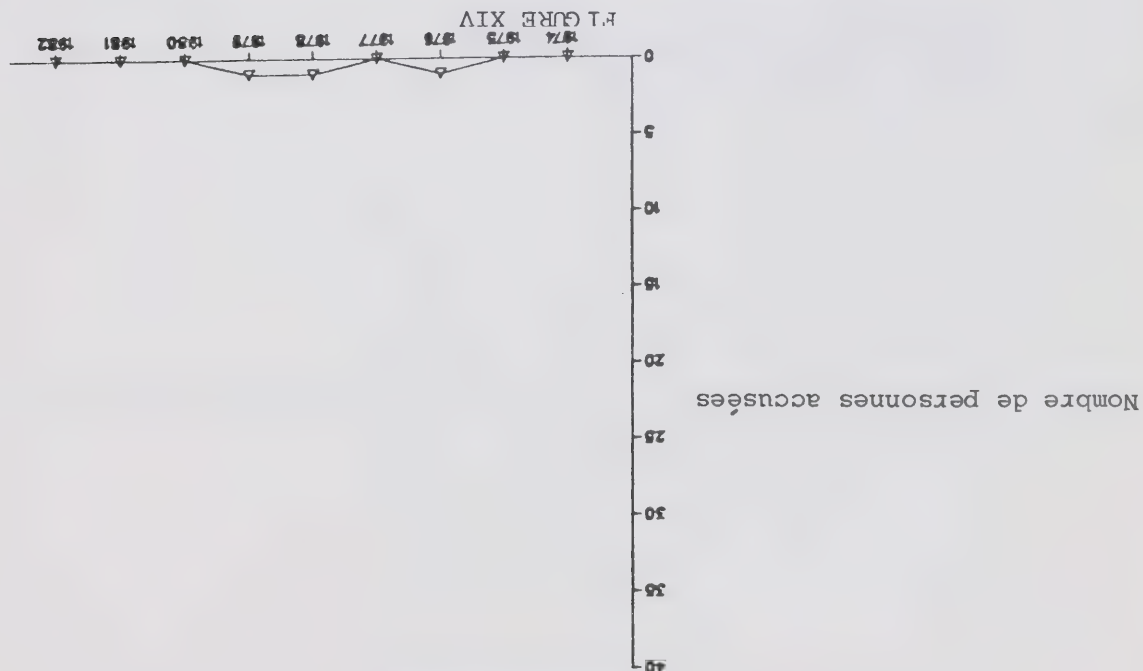








Personnes accusées d'infractions visant à  
corrompre les mœurs publiques  
Terre-Neuve  
1974 à 1982



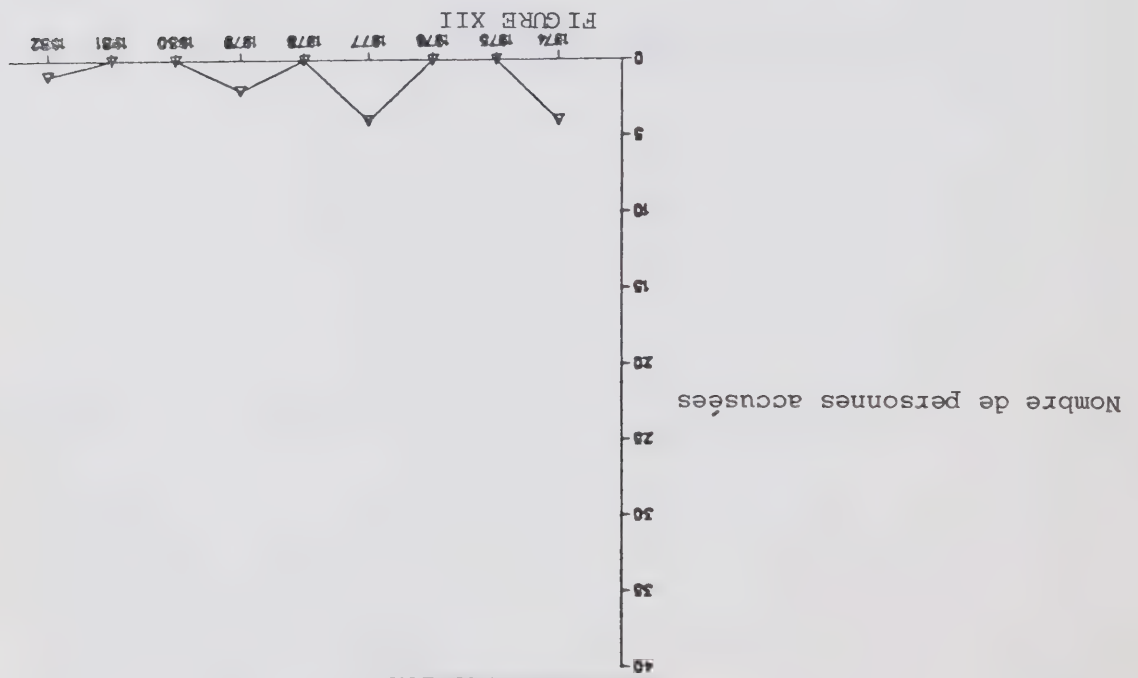
Personnes accusées d'infractions visant à  
corrompre les mœurs publiques  
Ile-du-Prince-Edouard  
1974 à 1982

FIGURE XIII

FIGURE XI

Personnes accusées d'infractions visant à  
corrompre les moeurs publiques  
1974 à 1982

Nouveau-Brunswick



Personnes accusées d'infractions visant à  
corrompre les moeurs publiques  
1974 à 1982

Nouvelle-Écosse

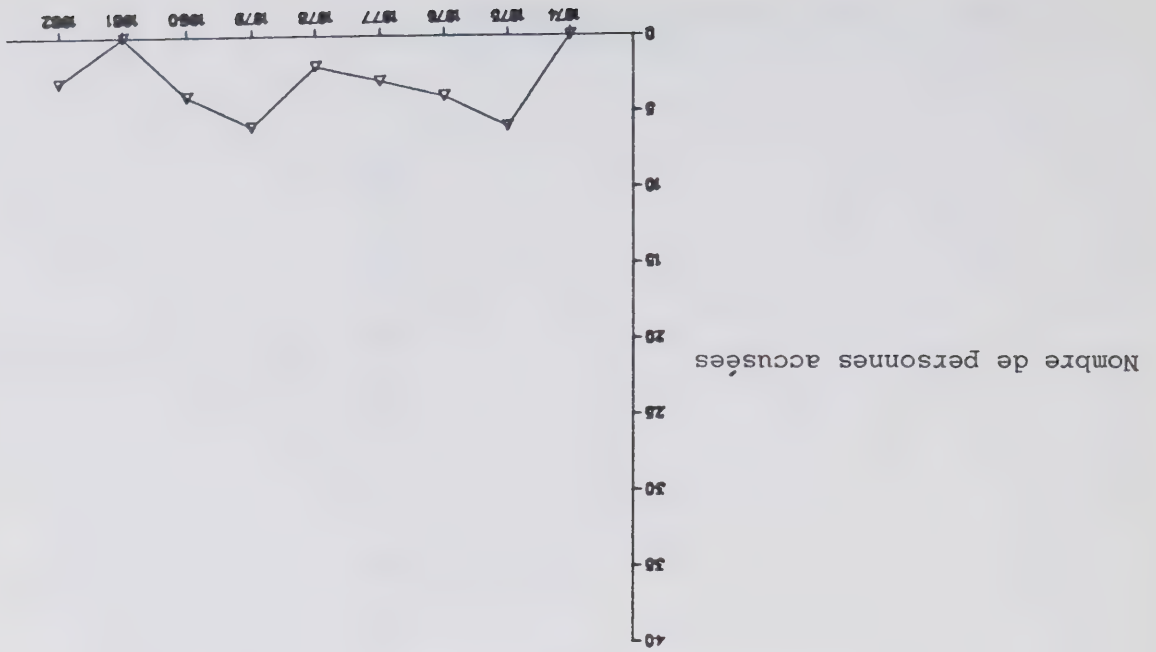
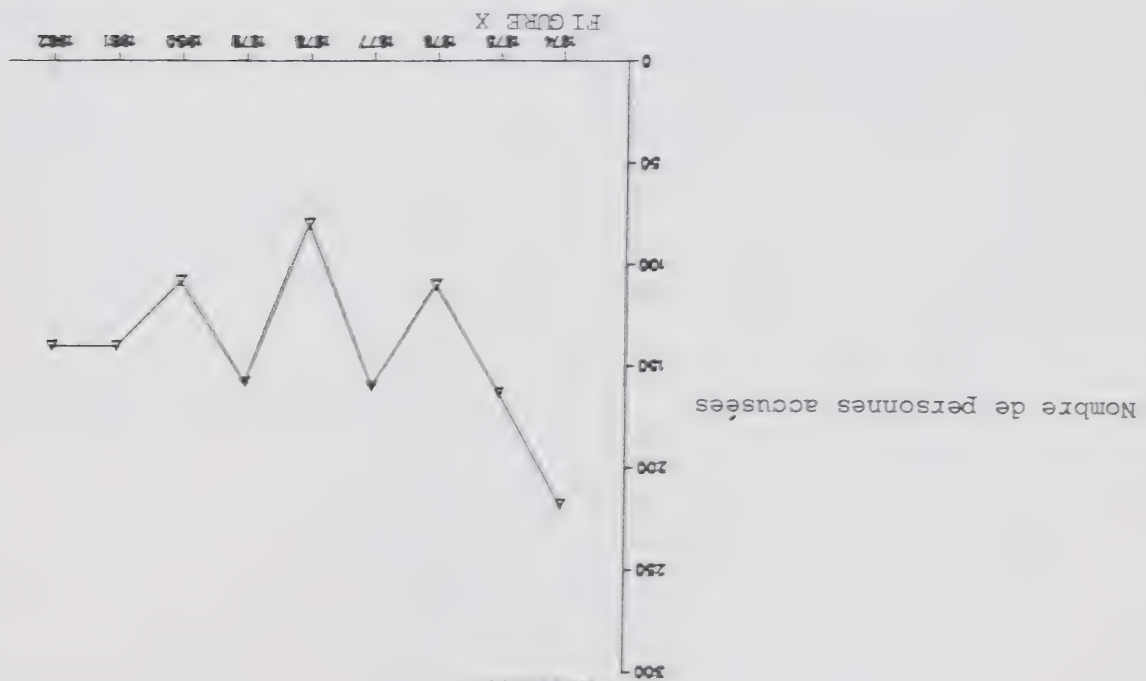


FIGURE IX

Personnes accusées d'infractions visant à corrompre les moeurs publiques 1974 à 1982

Ontario



Personnes accusées d'infractions visant à corrompre les moeurs publiques 1974 à 1982

Québec

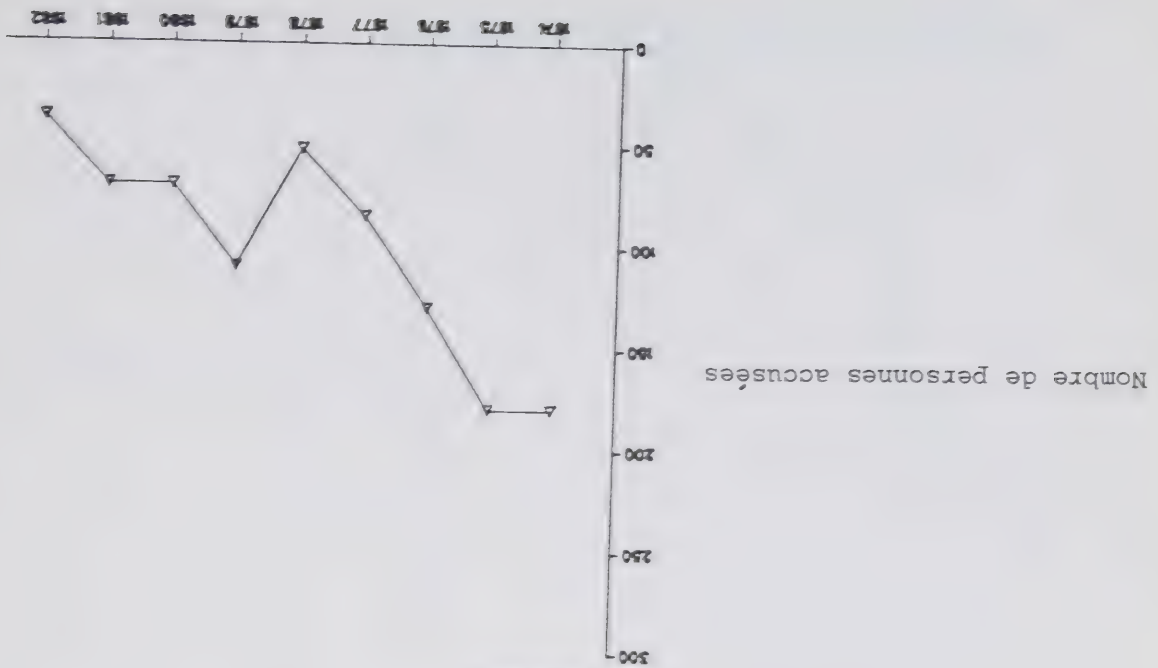
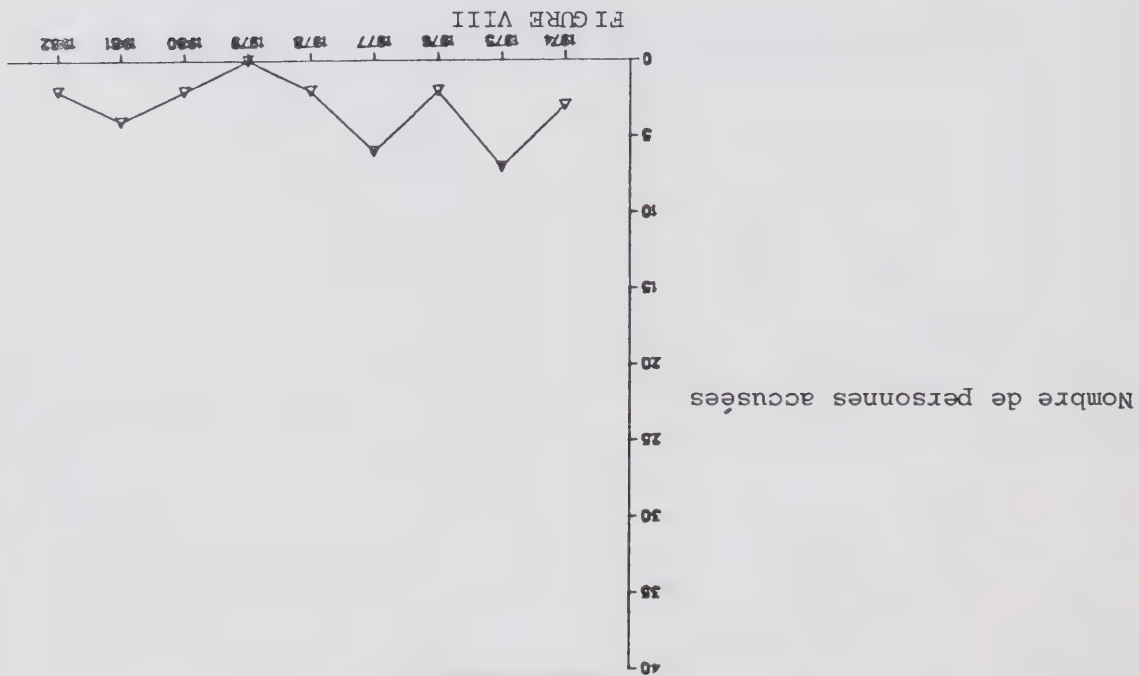


FIGURE VII

Personnes accusées d'infractions visant à  
corrompre les moeurs publiques  
1974 à 1982

Saskatchewan



Personnes accusées d'infractions visant à  
corrompre les moeurs publiques  
1974 à 1982

Manitoba

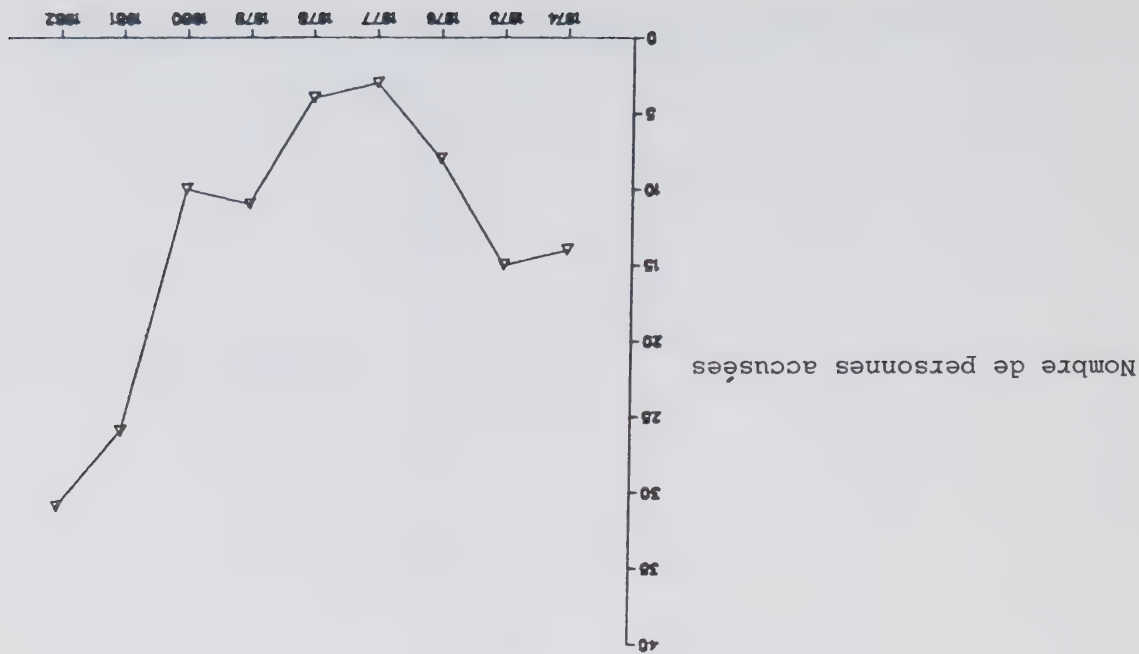
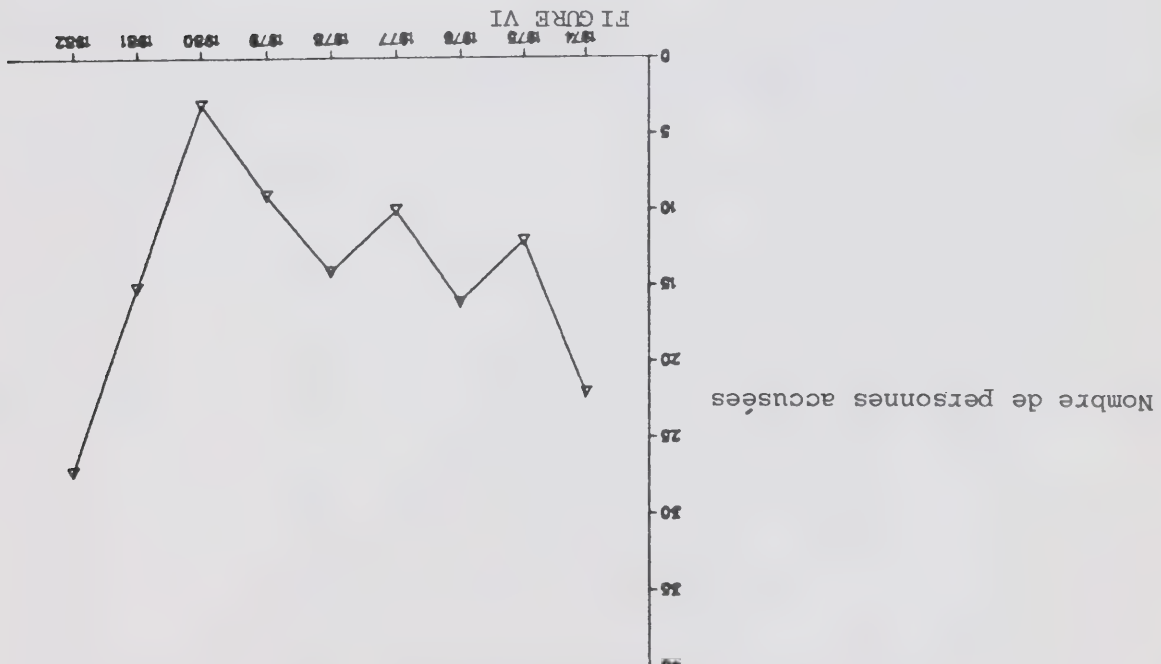




FIGURE V

Personnes accusées d'infractions visant à  
corrompre les moeurs publiques  
Colombie-Britannique  
1974 à 1982



Personnes accusées d'infractions visant à  
corrompre les moeurs publiques  
Alberta  
1974 à 1982

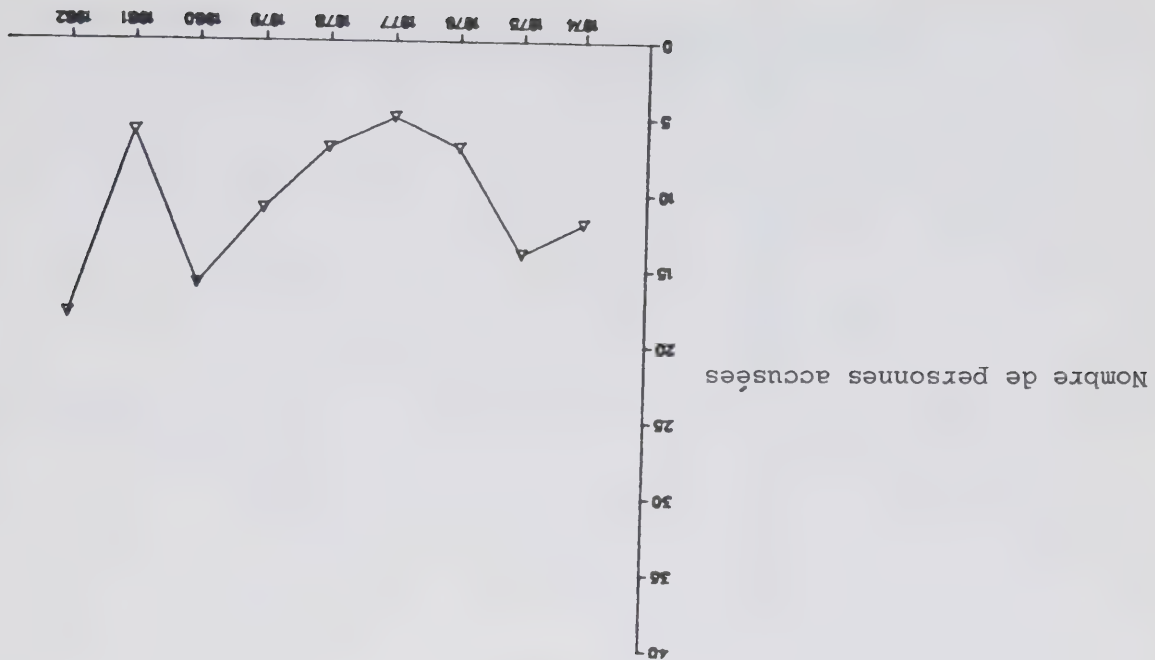


FIGURE III

Infractions visant à corrompre les moeurs  
publiques, 1974 à 1982, Canada

Infractions réglées

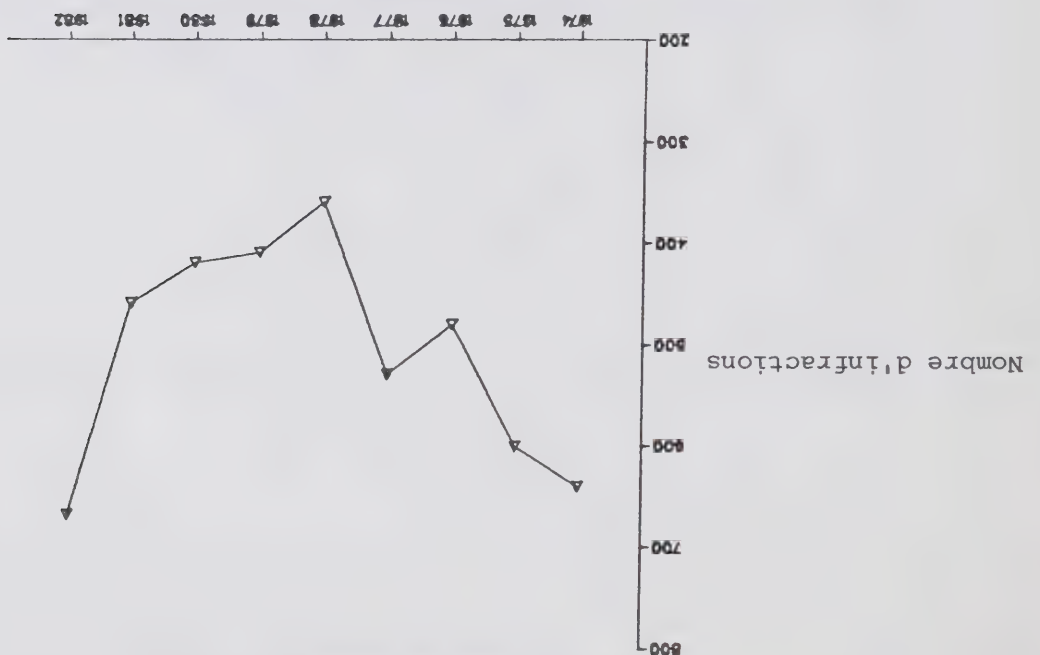
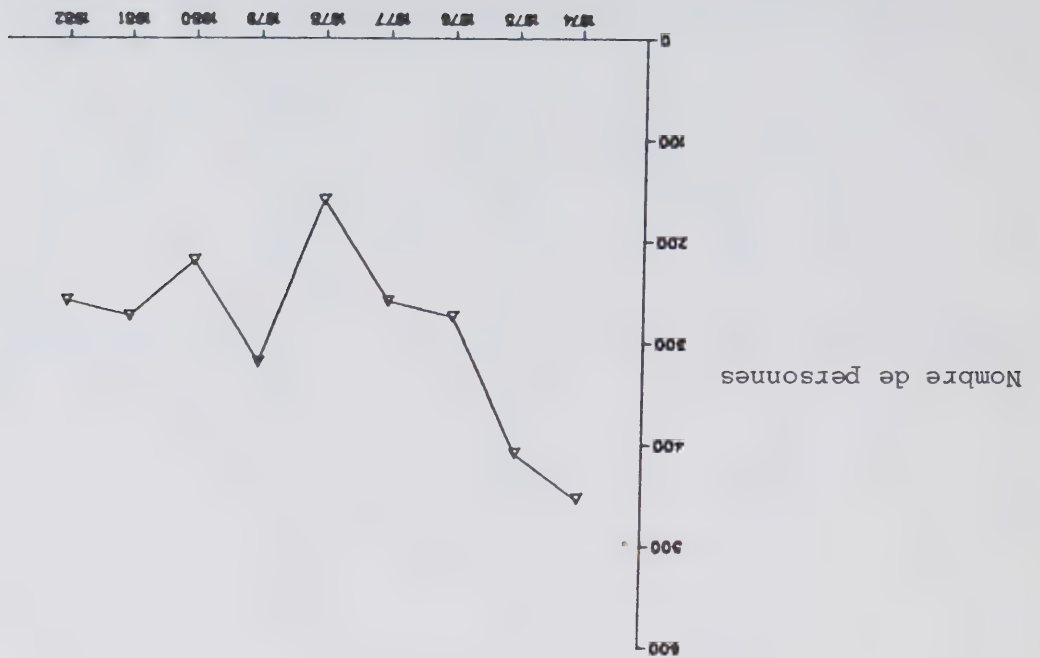


FIGURE IV

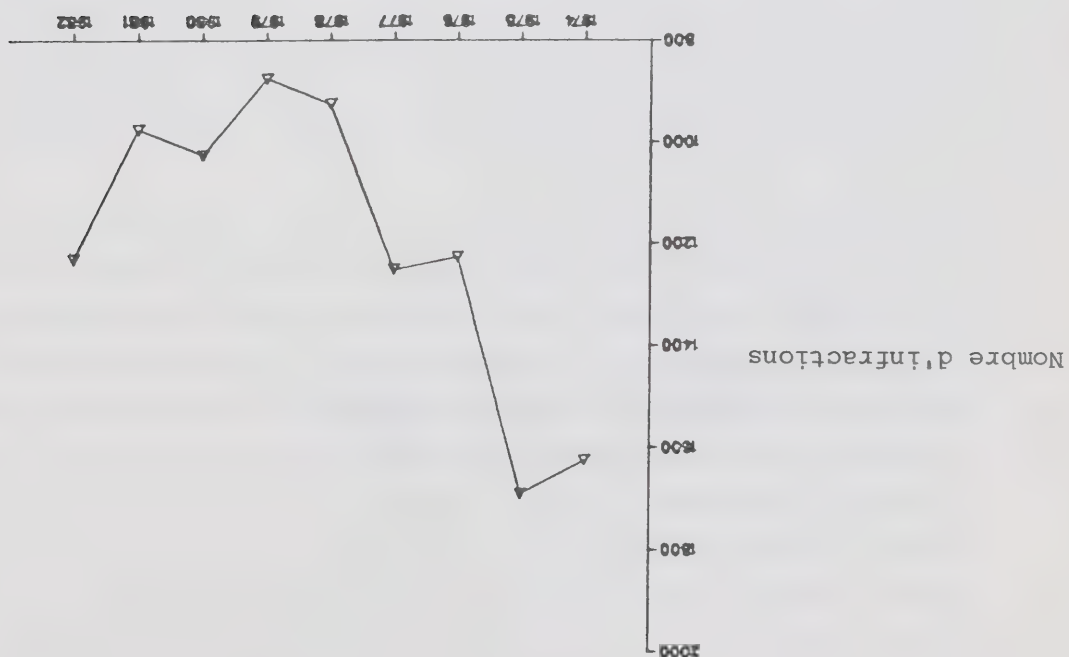
Infractions visant à corrompre les moeurs  
publiques, 1974 à 1982, Canada

Nombre de personnes accusées

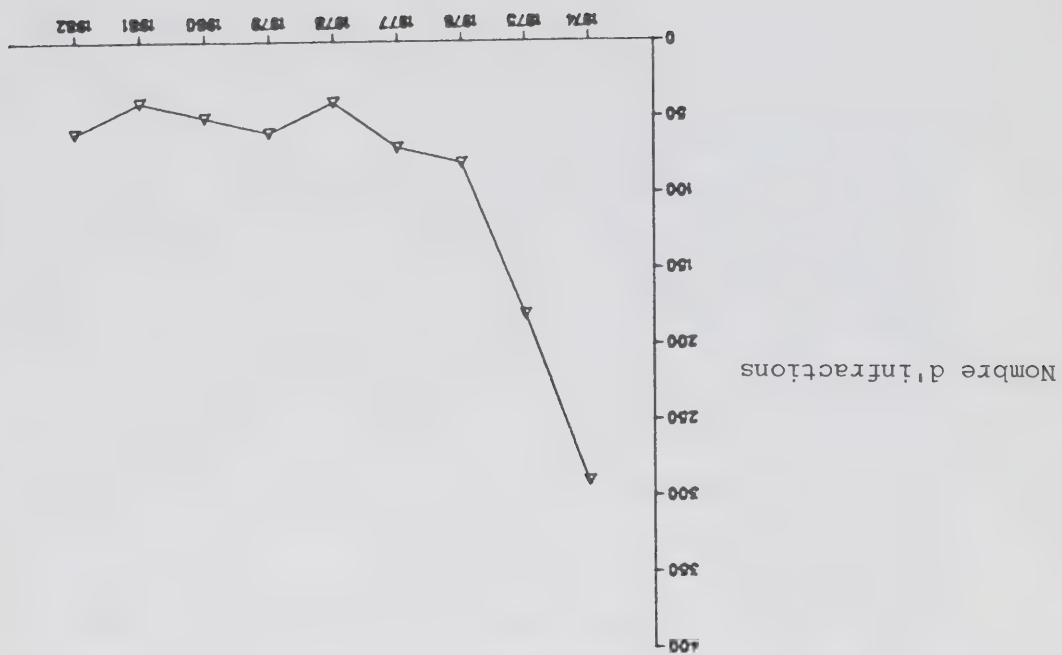


Infractions visant à corrompre les moeurs  
publiques, 1974 à 1982, Canada  
Infractions rapportées ou connues de la police

FIGURE I



Infractions visant à corrompre les moeurs  
publiques, 1974 à 1982, Canada  
Accusations non fondées



Le critère du tort social a un certain rôle à jouer dans l'interdiction des images de violence sexuelle. Le nouveau critère de censure du Québec, soit l'incitation ou l'encouragement à la violence sexuelle, donne une direction possible à la jurisprudence. L'auteur, l'éditeur ou le producteur d'un film qui encourage ou soutient la violence sexuelle ou la cruauté n'est pas nécessairement à l'abri d'une sanction pénale en invoquant le droit légitime à la liberté d'expression. La décision récente du juge Borins de la Cour de c. dans l'affaire Rex. c. Doug Rankine and Act III Video suggère aussi une nouvelle direction à la lutte contre l'obscénité au criminel, la Cour traçant, pour l'information de tous, une ligne de démarcation entre la sexualité explicite et la contrainte sexuelle.

5. Dans les cas particuliers, les bureaux de censure devraient permettre au public l'accès au processus de prise de décisions. Les raisons qui ont présidé aux coupures et aux rejets devraient être exposées par écrit à des fins d'examen par le public. Il n'y a aucune raison pour refuser au public l'accès au processus de prise de décisions entrepris dans l'intérêt du public.

6. La surveillance, par les bureaux de censure, de la vente et de la location de bandes magnétoscopiques apparaît comme un accroissement coûteux et superflu du pouvoir provincial. Les prescriptions du Droit criminel en matière d'obscénité devraient pouvoir s'appliquer parfaitement à ce nouveau moyen de communication; historiquement, les provinces se sont intéressées à la présentation publique des films.

Bien que cette intrusion provinciale dans une sphère plus privée apparaisse inappropriée, une certaine forme de réglementation est néanmoins souhaitable. Les exploitants de points de vente ou de location devraient être obligés d'indiquer sur les bandes examinées par la province la cote accordée par cette dernière. Si un film n'a pas été examiné, il doit porter la mention "non classifié". Le consommateur est ainsi mieux renseigné et le distributeur peut se tenir davantage au courant du contexte légal dans lequel s'inscrivent ses activités de distribution.

7. La norme de tolérance de la société ne peut constituer à elle seule le fondement des interdictions des bureaux de censure ou des condamnations au criminel. Bien que ce critère de tolérance soit un facteur qui influe sur le processus de prise de décisions, il soulève en fin de compte plus de questions qu'il n'apporte de réponses. Si 60 pour cent des Ontariens veulent interdire les scènes de sexualité explicite, la prohibition doit-elle s'ensuivre? Est-ce suffisant de prouver seulement l'intolérance?



L'article met en lumière la validité des décisions prises par les bureaux de censure dans le domaine de la censure et de la classification des films. Bien que les dispositions légales de la procédure au criminel puissent encore être invoquées contre un film coté par une province, il est bien dit ici qu'il s'agit là d'une circonstance exceptionnelle exigeant le "consentement personnel du procureur général". L'article évoque la possibilité de conflits publics pouvant découler d'une différence de perception entre ceux qui sont chargés d'appliquer la loi relative à l'obscénité et ceux qui, au Bureau de censure, sont dûment autorisés à censurer le matériel. Pour autant que cela favorise une meilleure compréhension du processus de prise de décisions dans le domaine public, la proposition peut être envisagée comme un progrès.

3. Les bureaux de censure provinciaux devraient conserver leur pouvoir de prohibition et de classification. Les dispositions légales de l'art. 159 et les décisions judiciaires existantes, même si elles déterminent en fin de compte l'obscénité, ne sont pas assez précises pour orienter la politique des bureaux dans un cas particulier. Il faut reconnaître également que l'autonomie provinciale a son importance ici et que la juridiction provinciale en matière de "propriété et de droits civils" ainsi que dans les cas de "nature locale et privée" justifie les interventions. La norme de tolérance collective et la conception de la nocivité peuvent varier d'une province à l'autre; il semble donc raisonnable de respecter ces différences régionales.

4. L'attitude adoptée par la Cour d'appel de l'Ontario lors de la décision dans l'affaire Ontario Film and Video Appreciation Society devrait se retrouver dans la législation des provinces. Chaque Bureau de censure devrait présenter ses critères de censure et de classification sous forme de lois ou de règlements. En dépit du fait que la terminologie peut être difficile à élaborer, il apparaît important que l'article un de la Charte ne soit pas mis de côté; le pouvoir de prohiber comporte la nécessité de fournir des justifications au public.

mots "représentation dégradante" n'apportent aucune sorte d'éclaircissement aux tribunaux; ils sont vraiment critiqués parce qu'ils sont trop vagues.

Il faut noter que la définition de la "violence sexuelle" donnée ci-dessus contient les deux interdictions du rapport Williams:

Le matériel dont la production semble avoir signifié, pour le tribunal, l'exploitation d'une personne à des fins sexuelles, lorsque a) ou bien il appert que, d'après l'ensemble des témoignages, cette personne était âgée de moins de seize ans au moment de l'infraction; b) ou bien il y a des raisons de croire que le matériel ait causé un tort physique réel à cette personne<sup>131</sup>.

2. Le par. 163(1) du Code devrait être adopté tel qu'il est proposé et formulé actuellement:

"163.1 Des poursuites à l'égard de la distribution, de la représentation ou de la possession d'un film ou d'une bande magnétoscopique ne peuvent être intentées en vertu des articles 159 ou 163 sans le consentement personnel du procureur général lorsque les actes reprochés sont posés en conformité avec la cote donnée au film ou à la bande magnétoscopique en application des lois de la province où ces actes sont posés."

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<sup>131</sup> Report of the Committee on Obscenity and Film Censorship, note 2 ci-dessus, p. 161.

Les pages qui précèdent contiennent implicitement de nombreuses conclusions se rapportant aux pouvoirs provinciaux de censure et de classification de même qu'aux prescriptions fédérales en matière d'obscénité. Nous nous devons maintenant d'expliquer davantage nos remarques qui seront peut-être quelque peu utiles aux discussions en comités.

1. La définition de l'obscénité proposée par le projet de loi C-19 pourrait encore être modifiée de la façon suivante:

par. 159(8) - Pour l'application de la présente loi, est obscène toute matière ou chose dont une caractéristique dominante est l'exploitation induite de la violence sexuelle ou de la cruauté.

Il n'est pas évident que les relations sexuelles entre adultes consentants soient du ressort du droit criminel; ce n'est pas l'exploitation induite de la "sexualité" mais de la "violence sexuelle" qui est rapportée comme un problème par les recherches empiriques. Il ne semble pas nécessaire d'inclure le sujet de l'horreur et du crime dans le par. 18 de l'art. 159; il n'y a aucun prononcé qui fasse emploi de ces termes; il semble que la notion de violence sexuelle et de cruauté recouvrirait parfaitement le champ du matériel condamnable.

La proposition qui est faite d'ajouter au par. 159(8) les détails suivants "au moyen de la représentation dégradante de personnes de sexe masculin ou féminin ou de toute autre façon", déplace notre attention du critère de tolérance de la société vers une certaine conception du tort social. Cependant, les termes utilisés ne font pas penser à des images qui appellent une condamnation au criminel. Dans un sens, nous pouvons dire que beaucoup d'annonces publicitaires à la télévision dégradent à la fois les femmes et les hommes, et pourtant le recours à des sanctions criminelles serait très peu approprié. Les

Et pour finir, la question plus générale de la sexualité et de la violence réunies est peut-être mieux comprise dans un contexte de fantasmes qui font l'objet de controverses ne sont que les vrais reflets de la vie sociale. Dans la mesure où les hommes et les femmes se perçoivent uniquement comme des marchandises à obtenir, ils enracinent dans les relations interpersonnelles un comportement de prédateurs.

Les fantasmes de sexualité et de violence agissent comme un baromètre sur la condition des relations humaines. En tant que force sociale et reflet du changement de la structure sociale, ils ne se laissent pas vaincre facilement par des décisions écrites noir sur blanc. Nous associons le plaisir sexuel aux souffrances de la domination et de l'exploitation et nous tissons tout bonnement une toile aux fils emmêlés.



Le débat concernant la relation de cause à effet entre la consommation de pornographie et la violence réelle n'est pas particulièrement crucial ici. Bien qu'il soit sûrement difficile d'établir sans équivoque une pareille relation<sup>129</sup>, la sanction criminelle est une prémisse appropriée en cas de tort social. Dans la mesure où un moyen de communication soutient ou encourage la violence sexuelle, ou la cruauté, il peut vraiment être déclaré obscène et non approprié à la sphère publique. Les images de films et celles d'autres médias ont le pouvoir d'influencer les attitudes des males envers l'agression contre les femmes et de renforcer positivement la sexualité coercitive.

Le caractère vague de la norme est néanmoins un problème. La violence sexuelle peut être différenciée de la violence du hockey ou de la boxe. L'illusion du combat juste n'existe pas ici. Mais le soutien ou l'encouragement de la violence sexuelle ou de la cruauté restent des critères subjectifs, la ligne rigide de la condamnation criminelle étant difficile à tracer.

C'est, néanmoins, une perception pertinente du problème. Le pouvoir provincial de refuser la représentation publique n'est pas, en soi, une restriction lourde de la liberté d'expression, et la procédure criminelle en matière d'obscénité permettra de débattre la légitimité de ce qui est virtuellement une sorte de littérature haineuse dans le domaine sexuel. Dans les cas de culpabilité, l'habitude sera d'imposer une peine pécuniaire seulement. La représentation privée de la sexualité ne constitue pas un objet de surveillance<sup>130</sup>.

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<sup>129</sup> Voir, par exemple, Kutichinsky, B. Law, Pornography and Crime: The Danish Experience, Londres, Martin Robertson, 1978.

<sup>130</sup> Un point de vue quelque peu opposé est exposé dans l'affaire *Hawshaw et La Couronne* (1982), 69 C.C.C., (2<sup>es</sup>) p. 503, (C.A. Ont.)



Deux grands films commerciaux Swept Away et The Gataway ou deux longs métrages neutres ont été présentés à quelque 270 sujets. Dans Swept Away et The Gataway, les femmes sont montrées comme des victimes dans des contextes à la fois sexuel et non sexuel. Les sujets ont rempli, plusieurs jours après la représentation, des questionnaires évaluant l'acceptation de la violence contre les femmes, l'acceptation du mythe du viol et la croyance en des relations sexuelles entre adversaires. Les comparaisons entre ceux qui avaient vu Swept Away et The Gataway et ceux qui avaient vu les films neutres ont révélé d'importantes différences dans les attitudes exprimées. Malamuth et Donnerstein notent:

"Les résultats montrent que l'exposition à des scènes dépeignant la violence sexuelle comme ayant des conséquences positives ont augmenté, de façon importante, l'acceptation, chez les sujets mâles mais pas femelles, de la violence interpersonnelle contre les femmes et ont eu tendance à augmenter, chez les mâles, l'acceptation des mythes du viol"<sup>127</sup>.

Malamuth et Donnerstein nous disent que le contexte est un facteur important à considérer lorsque nous voulons observer un problème. En soi, la description de la violence sexuelle ne peut soulever d'objections; c'est le message sous-jacent à la description qui demande à être évalué. Il semble y avoir peu de preuves empiriques confirmant le tort social que peut renfermer la permission de représenter des relations sexuelles explicites<sup>128</sup>. C'est plutôt le soutien ou l'encouragement possible de la violence sexuelle qui constituent des problèmes. Dans la pornographie, nous voyons les reflets de la réalité des relations hommes-femmes et une structuration simultanée des attitudes exprimées et des possibilités d'excitation physiologiques.

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127 Malamuth et Donnerstein, note 53 ci-dessus, p. 115.

128 Voir Donnerstein, E. "Pornography: Its Effect on Violence Against Women", note 119 ci-dessus.

bouteille de scotch ou un appareil de télévision en couleurs. Les seins et le vagin sont les objets de valeur et le pénis est l'arme du crime.

Malamuth, Check, Donnerstein et beaucoup d'autres ont toutefois été

franchement critiques pour ce que Thelma McCormack a appelé le "Machismo in Media Research". McCormack note que: "... un modèle de recherche sensé a besoin de sujets des deux sexes, exactement comme des recherches analogues sur le racisme étudieraient des sujets noirs et des sujets blancs. Il est ... significatif que la recherche expérimentale sur la pornographie ait été réalisée par des hommes utilisant presque exclusivement des sujets mâles"<sup>124</sup>. McCormack conteste aussi le thème de beaucoup d'études empiriques jusqu'à ce jour. Elle est de ceux qui voient la pornographie "... comme une forme extrême, presque un travesti, de l'inégalité sexuelle dans laquelle les femmes servent d'objets sexuels pour exciter et satisfaire les hommes et rien de plus"<sup>125</sup>.

Malamuth et Check ont obtenu, par une expérience avec des sujets "... peut-être la preuve la plus solide jusqu'ici montrant que les représentations d'agressions sexuelles ayant des conséquences positives peuvent influencer, de façon adverse, des perceptions et des attitudes socialement importantes"<sup>126</sup>.

<sup>124</sup> T. McCormack, note 53 ci-dessus, p. 553.

<sup>125</sup> Ibid., p. 553.

<sup>126</sup> Malamuth, N. et Check, J.V.P. "The effects of mass media exposure on acceptance of violence against women: A field experiment. 15 Journal of Research in Personality, 1981, 436-446.

à possibilités faibles de viol; sur l'échelle, 62 mâles ont rapporté un "pas du tout probable", 42 mâles ont rapporté un deux ou davantage. Les sujets ont alors écouté l'une des trois bandes: une représentation de relations sexuelles mutuellement consenties, une représentation de viol où la victime non consentante au début devient par la suite excitée sexuellement et une représentation de viol où la victime a horreur de l'assaut, soit un "résultat négatif".

Malamuth et Check ont mesuré la turgescence du pénis et l'excitation auto-rapportée provoquées par ces stimuli<sup>123</sup>. Pour les mâles, tant à "possibilités élevées" qu'à "faibles possibilités" de viol, l'afflux de sang au pénis a augmenté de façon marquée dans la situation de viol ayant un résultat positif; en général, les hommes ont été davantage excités physiologiquement par la sexualité de caractère violent que par la sexualité à consentement mutuel; l'effet a été particulièrement prononcé sur ceux qui présentaient des possibilités élevées de viol. Pour ce qui est de l'excitation sexuelle rapportée, les hommes à possibilités élevées de viol ont indiqué qu'ils étaient aussi excités par le viol d'une victime ayant horreur de l'assaut sexuel que par la relation sexuelle à consentement mutuel.

L'étude ne présente pas un portrait flatteur de la sexualité mâle. La nature de prédateur du mâle se trouve exprimée dans le fait que presque 50 pour cent de ceux qui faisaient partie de l'échantillonage considéraient qu'il y avait pour eux possibilité d'agresser sexuellement une femme non consentante si l'assurance de ne pas en subir les conséquences leur était donnée. L'impression est que les femmes ont été "commodifiées" comme objets de satisfaction pour les mâles qui s'imaginent souvent en train de voler une femme presque de la même façon qu'un voleur s'imagine voler une

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123 Malamuth, N. et Check, J.V.P. "Aggressive-Pornography and Beliefs in Rape Myths: Individual Differences", manuscrit non publié, 1983.

C'est un thème auquel fait écho E.C. Nelson dans son étude exhaustive "Pornography and Sexual Aggression. Nelson écrit: "... la recherche continue de mettre l'accent sur l'utilité de faire la distinction entre les effets du matériel sexuel violent et ceux du matériel sexuel non agressif"<sup>120</sup>. Nelson poursuit: "... même aujourd'hui, il est assez clair que l'observation de scènes de violence sexuelle pousse à l'agression chez celui qui observe - le fait de modifier le contexte dans lequel l'agression est observée ne semble rien changer"<sup>121</sup>. Les possibilités de répercussion des images violentes sur la réalité des relations sociales paraissent bien établies. Nelson décrit bien ce processus: "... le modelage d'attitudes et de comportements qui font penser que l'agression des femmes par les mâles est justifiée influence sans aucun doute certains mâles à ne pas tenir compte du non-consentement des femmes et renforce leurs croyances au sujet de la pertinence d'utiliser la force ou l'intimidation pour amener une femme à faire tout ce qu'ils veulent qu'elle fasse"<sup>122</sup>.

Les spécialistes des sciences sociales, en particulier les psychologues sociaux, étudient maintenant le contenu agressif de la sexualité, en faisant des expériences avec des cas sociaux et en laboratoire. Une étude récente a porté sur 104 sujets mâles au Manitoba. À la première session, des questionnaires ont été distribués et une des questions étant destinée à savoir s'il y avait possibilité pour le sujet de commettre un viol si "... il pouvait avoir la garantie formelle de ne pas être pris et puni". Une échelle en cinq points était présentée, le point un représentant "pas du tout probable" et le point cinq, "très probable". Les sujets ont ensuite été divisés en groupes à possibilités élevées de viol et

- 120 E.C. Nelson, note 53 ci-dessus, p. 236.
- 121 Ibid., p. 236.
- 122 Ibid., p. 234.



116 L'après-guerre. La President's Commission on Obscenity and Pornography de 1970 diffère aussi du Williams Report de 1979 en Grande-Bretagne, ce dernier étant peut-être plus en relation avec les circonstances actuelles. Un volume du Journal of Social Issues de 1973 a eu comme sujet vedette la pornographie - des articles qui parlaient de "consommateurs d'érotisme", de "matériel sexuel explicite" et de "films érotiques". Rien n'autorisait à penser que le sujet à l'étude était celui de la violence sexuelle dans les scènes de films, ce qui est au coeur des préoccupations actuelles<sup>117</sup>.

Dans un article de revue de 1982<sup>118</sup>, Malamuth et Donnerstein présentent les détails d'une recherche récente portant sur la pornographie agressive. Dans un chapitre de livre sous presse actuellement, Donnerstein écrit: "C'est le contenu violent de la pornographie qui contribue le plus à la violence contre les femmes ... lorsque nous retirons le contenu sexuel de films semblables et que nous laissons seulement l'aspect agressif, nous trouvons un modèle analogue d'agression et d'attitudes associées ... Le problème réside ici dans ce que nous entendons par pornographie. Est-ce que nous discutons uniquement de matériel explicite sexuellement? Aucune recherche jusqu'ici ne donne à penser que l'exposition à du matériel semblable puisse avoir des effets nocifs"<sup>119</sup>.

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116 Technical Reports of the Commission on Obscenity and Pornography, Washington (D.C.), E.-U., Government Printing Office, 1971.  
 117 "Pornography: Attitudes, Use, and Effects", 29(3) Journal of Social Issues, 1973, 1-227.

118 Malamuth et Donnerstein, note 53 ci-dessus.

119 Donnerstein, E. "Pornography: Its Effect on Violence Against Women", in Malamuth N. et Donnerstein, E. Pornography and Sexual Aggression, New York, Academic Press, sous presse, p. 32.



comportent, essentiellement ou partiellement, des scènes dépeignant la violence et la cruauté combinées avec le sexe, en particulier lorsque les affronts dégradent et déshumanisent les personnes à qui ils sont faits, dépassent le degré de tolérance de la société"<sup>115</sup>.

Bien que Borins ait trouvé "insipides", "ennuyantes" et "non artistiques" les scènes sans violence de sexualité explicite, il n'a pas jugé bon de les interdire.

Le jugement dans Rex c. Doug Rankine nous rappelle que les tribunaux sont, en fin de compte, sensibles aux arguments qui se rapportent à l'objectif de la censure. Même si c'est le critère de la tolérance de la société qui est invoqué et déterminant dans ce cas en litige, c'est l'accent mis sur la violence sexuelle qui est le plus instructif.

Au cours de la dernière décennie, le centre des préoccupations du public quant à l'obscénité et à la censure s'est déplacé. La question du tort public commence à déloger celle de la moralité publique; le point saillant à l'ordre du jour est la violence sexuelle. Deux psychologues sociaux travaillant aux États-Unis, Neil Malamuth et Ed Donnerstein, sont au coeur de beaucoup de controverses. Leurs recherches en laboratoire et sur le terrain déplacent notre attention de la notion de tolérance collective à la question des coûts sociaux de la pornographie.

La réalisation d'une recherche empirique approfondie portant sur les coûts sociaux de la pornographie a longtemps été un problème. Les sujets d'étude ont changé avec le temps; les préoccupations du début des années soixante-dix diffèrent de celles d'aujourd'hui et de celles de

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115 R. c. Doug Rankine Company Ltd. and Act III Video Productions Ltd., note 104 ci-dessus, p. 163.

"... la Couronne a établi que les dispositions prévues à l'alinéa a) du par. 8 et au par. 8 de l'art. 159 constituaient des limites raisonnables dans la mesure où ces limites peuvent être justifiées dans une société libre et démocratique"<sup>113</sup>.

Et le juge Collins de continuer:

"... il semble y avoir quelque incertitude au sujet de la façon de déterminer ce qui est ou ce qui n'est pas obscène. Quelle que soit la cause de cette incertitude, elle ne découle pas, à mon avis, d'un manque de clarté dans la loi. Je crois que la loi est suffisamment claire pour ce citoyen bien intentionné dont parle l'éminent avocat de la défense"<sup>114</sup>.

Et pourtant, il faut reconnaître que ce qui constitue la cible propre de la censure demeure un sujet de discussion, nonobstant les arguments juridiques et constitutionnels. Dans l'affaire Rex c. Doug Rankine Co. Ltd. and Act III Video Productions, le juge Stephen Borins de la Cour de comté a tenté de traiter spécialement cette question, présentant un nouvel éclairage à l'analyse judiciaire. En décidant que certains films ne pouvaient pas vraiment être qualifiés d'obscènes, Borins fait cette remarque:

"Tous les films renferment ce que la Couronne décrit comme des "scènes normales et banales" de relations sexuelles. À mon avis, les normes de la société contemporaine toléreraient aussi la distribution de films qui renferment des scènes de lesbianisme, de fellatio, de sexe en groupe, de cunnilingus et de sexe anal. Cependant, les films qui

113 R. c. Red Hot Video, note 1 ci-dessus, p. 353.

114 Ibid., p. 353.

Les conséquences qui peuvent découler de la décision dans l'affaire McNeil restent assez confuses et obscures en raison d'un verdict rendu par une faible majorité de cinq contre quatre. Il semble qu'il y aurait une forte minorité pour douter de la validité du pouvoir de censure provincial, en soi. Il n'est pas certain qu'à l'avenir un tribunal accepte finalement ce point de vue que la restriction préalable des provinces en matière de cinéma est constitutionnellement acceptable. Néanmoins, la décision majoritaire dans l'affaire McNeil confirme le pouvoir de censure et de classification des provinces. L'article 37 du projet de loi C-19, présenté récemment, semblerait aussi reconnaître implicitement l'autonomie provinciale en matière de censure et de classification. L'article prescrit que nulle poursuite criminelle pour un film classé par une province ne peut être intentée

"... sans le consentement personnel du procureur général"<sup>112</sup>.

Le défi aux normes d'interdiction du Censor Board est vu comme une circonstance exceptionnelle; l'accent est mis ici sur le croisement des rôles de la juridiction fédérale et de la juridiction provinciale.

Mais ce n'est pas uniquement le pouvoir de censure provincial qui fait l'objet d'un examen minutieux par les tribunaux canadiens. Dans l'affaire Rex c. Red Hot Video, l'avocat de l'accusé a soutenu que les dispositions relatives à l'obscénité dans le Code criminel contrevenaient à l'alinéa b) de l'art. 2 et à l'art. 7 de la Charte, au droit à la liberté d'expression et au droit "à la vie, à la liberté et à la sécurité de la personne". Le juge Collins de la Cour provinciale a déclaré:

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<sup>112</sup> Canada, Chambre des Communes, projet de loi C-19, Loi de réforme du droit criminel, 1984, art. 36, 37.

"... il n'y a aucune raison constitutionnelle pour qu'une poursuite ne soit pas soumise à l'art. 163 du Code criminel à l'égard de la présentation d'un film que le Board of Censors a approuvé comme étant conforme à ses normes de décence"<sup>110</sup>.

En dernier ressort, le juge Ritchie fait reposer la validité constitutionnelle de la censure provinciale sur les par. 13 et 16 de l'art. 92 de l'Acte de l'Amérique du Nord britannique, en faisant remarquer que les "droits civils et de propriété" et les "questions de nature locale et privée" s'inscrivent dans le cadre légal du Board of Censors.

Le juge dissident dans l'affaire McNeil, B. Laskin, adopte une démarche tout à fait différente. Le regretté Juge en chef soutient que le pouvoir de censure provinciale en Nouvelle-Écosse n'est pas enraciné dans la juridiction provinciale et de déclarer:

"... Le Board affirme son autorité pour protéger la morale publique et pour empêcher que le public soit exposé à des idées véhiculées par les films, à des scènes de cinéma qu'il considère comme moralement offensantes, indécentes et probablement obscènes. La définition de ce qui est décent ou indécent ou obscène dans une conduite ou une publication, de ce qui est moralement convenable pour présentation publique, soit au cinéma, en art ou dans un spectacle est, en soi, du ressort exclusif du Parlement du Canada en vertu de son autorité définie pour légiférer relativement au Code criminel"<sup>111</sup>.

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111 Ibid., p. 14.

110 Ibid., p. 24.

Jusqu'à ce jour, le prononcé le plus important de la Cour suprême sur le sujet de la censure provinciale a été dans l'affaire Nova Scotia Board of Censors et al. and McNeil. La Cour a statué que, bien qu'un règlement quant à l'interdiction de représentations théâtrales indécentes outrepassait la juridiction de la province, la structure légale de l'approche adoptée par la Nouvelle-Écosse pour la censure du cinéma appartenait vraiment à la sphère provinciale. C'est la censure, par la Nouvelle-Écosse du film *Dernier Tango à Paris* qui a provoqué cette dispute constitutionnelle. L'argument était que le pouvoir de censure lui-même outrepassait la juridiction provinciale et que c'était à la loi criminelle fédérale formulée dans l'art. 159 du Code criminel que revenait un pouvoir semblable.

Le juge Ritchie, parlant au nom de la majorité dans l'affaire McNeil, a déclaré:

"Il n'y a pas, à mon avis, de barrière constitutionnelle qui empêche le Board d'interdire la présentation d'un film en Nouvelle-Écosse pour le seul motif qu'il ne correspond pas aux normes de moralité que le Board lui-même a fixées, nonobstant le fait que le film ne contrevient à aucune disposition du Code criminel<sup>109</sup>."

La majorité de dire alors que des normes d'interdiction différentes pour les provinces et le gouvernement fédéral peuvent être considérées comme valides constitutionnellement. Le juge Ritchie d'ajouter:

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109 Nova Scotia Board of Censors et al. and McNeil, note 13 ci-dessus, p. 24.



Cette dernière déclaration de principe de la Cour de division n'a pas été sanctionnée par la Cour d'appel de l'Ontario. Bien que la Cour d'appel ait maintenu la décision de la Cour de division, elle s'est inscrite en faux contre cette idée que les tribunaux imposeraient des "restrictions considérables" en examinant le caractère raisonnable des dispositions législatives. La Cour a déclaré:

"Nous ne pensons pas, pour autant qu'ils prétendaient énoncer un principe, qu'il y ait un principe de ce genre pouvant être appliqué dans la détermination de ce qui est "raisonnable" en vertu de l'art. 1 de la Charte. En abordant la question, il n'y a aucune présomption pour ou contre la loi..."108.

La décision de la Cour d'appel de l'Ontario a deux effets pratiques. Premièrement, toutes les provinces doivent apporter beaucoup d'attention à la rédaction des directives statutaires ou réglementaires servant à la censure et à la classification; dans le cas où la décision de la Cour d'appel de l'Ontario serait entérinée par la Cour suprême du Canada, la décision de cette dernière serait considérée nécessairement comme une réponse provinciale. Deuxièmement, la décision de la Cour d'appel signifie clairement que les normes d'interdiction et de classement peuvent continuer à faire l'objet d'un examen judiciaire minutieux, nonobstant un cadre législatif plus détaillé. Le rôle pertinent des responsables de la censure et de la classification pour la province demeure un sujet de débats juridiques.

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108 Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 83 ci-dessus, p. 4.

qu'ils sont trop généraux et que les critères détaillés utilisés dans le procès ne sont pas prescrits par la loi<sup>105</sup>.

La Cour a ajouté que les articles en question,

"... peuvent être rendus opératoires par l'adoption de règlements conformes au pouvoir législatif ou par la promulgation de modifications de la loi, imposant des normes et des limites raisonnables"<sup>106</sup>.

La décision de la Cour de division ne signifie pas qu'elle critique la valeur réelle des critères utilisés par le Board of Censors de l'Ontario pour interdire la présentation publique de films. La Cour fait remarquer:

"Quant à la question de savoir si les normes adoptées par le Board of Censors pourraient être considérées comme des limites raisonnables, nous ne nous prononçons pas. Elles peuvent être acceptables ou ne pas l'être, mais en tenant compte de la position que nous prenons sur la question suivante, il n'est pas nécessaire que nous exprimions notre opinion. Une chose est cependant certaine: nos tribunaux imposeraient des restrictions considérables en déclarant que les dispositions législatives, qu'elles soient statutaires ou réglementaires, ne sont pas raisonnables"<sup>107</sup>.

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<sup>105</sup> Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 1 ci-dessus, p. 87.

<sup>106</sup> Ibid., p. 67.

<sup>107</sup> Ibid., p. 65.

Ce qui représente un intérêt particulier pour le dialogue fédéral-provincial en matière d'obscénité et de censure, ce sont les décisions récentes de la Cour de division et de la Cour d'appel de l'Ontario dans l'affaire Ontario Film and Video Appreciation Society and Ontario Board of Censors. La Film and Video Appreciation Society a soutenu que certains articles de la Theatres Act de l'Ontario contrevenaient à la Charte des droits et libertés en restreignant arbitrairement la liberté d'expression.

TABEAU VI

Sentences, art. 159, 1978-1980

Condamnations Amende Libération Emprisonnement

1978	22	20	2	0
1979	26	23	2	1
1980	22	22	0	0
Total	70	65	4	1

La Cour de division a donné raison à la société incriminée en disant que, bien que le pouvoir de censure provincial fût constitutionnel, le cadre législatif actuel de l'Ontario accordait trop de pouvoirs discrétionnaires à sa commission de censure. La Cour a déclaré:

"... nous ne considérons pas les articles 3, 35 et 38 comme non valides, mais le problème est que, pris isolément, ils ne peuvent être invoqués pour censurer ou interdire la présentation de films parce

d'en trouver un exemple dans la jurisprudence. La peine pécuniaire semble être la sentence typique et symbolique que l'État impose au délinquant. Dans l'affaire Rex c. Ariadne Devs Ltd.<sup>100</sup>, la Cour d'appel de la Nouvelle-Écosse a réduit l'amende de la société incriminée de 12 500 \$ à 7 500 \$, en faisant valoir que cette dernière somme représentait les profits d'une année et constituait, à ce titre, une force de dissuasion appropriée.

La lutte contre l'obscénité prévue par la loi criminelle ne semble pas être une entreprise de grande envergure. Chaque année, au Canada, il y a moins de 300 personnes qui sont accusées d'obscénité; celles qui sont trouvées coupables reçoivent immanquablement une amende pour leur in conduite. Et cependant, la pornographie, l'obscénité et la censure demeurent des problèmes publics de grande importance; les décisions récentes dans les affaires suivantes Ontario Film and Video Appreciation Society and Ontario Board of Censors<sup>101</sup>, Nova Scotia Board of Censors et al. and McNeil<sup>102</sup>, Rex c. Red Hot Video Ltd.<sup>103</sup> et Rex c. Doug Rankine Company Ltd and Act III Video Productions Ltd<sup>104</sup> ont servi à aiguïser notre perception actuelle.

- 100 R. c. Ariadne Devs. Ltd., (1974) 19 C.C.C. (2<sup>e</sup>s) 49 (C.A.N.E.).
- 101 Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 1, note 83 ci-dessus.
- 102 Nova Scotia Board of Censors et al. and McNeil, note 23 ci-dessus.
- 103 R. c. Red Hot Video, note 1 ci-dessus.
- 104 R. c. Doug Rankine Company Ltd. and Act III Video Productions Ltd., Borins, Juge de la C. de C. (1984), 9 C.C.C. (3<sup>e</sup>s), p. 53.

Ces façons différentes d'appliquer la loi criminelle adoptées par les provinces soulèvent la question de l'établissement de relations efficaces avec les autorités en matière de censure et de classification. Les bureaux du Québec et de l'Ontario ont des perceptions bien différentes de la tolérance de la société; il semble assez raisonnable de dire que la plus grande tolérance du Bureau de surveillance du Québec se reflète dans les décisions prises par le personnel chargé de l'application de la loi, par la police et par les procureurs de la Couronne. Les critères plus restrictifs de l'Ontario semblent aussi se manifester dans la tendance qu'a l'Ontario d'avoir davantage recours aux procédures criminelles. Les bureaux de censure provinciaux ont des rôles importants à jouer, à la fois dans l'élaboration de modèles de surveillance provinciale et dans l'établissement d'un contexte de définition pour le par. 8 de l'art. 159 du Code criminel.

Les données des tribunaux relativement aux infractions criminelles en matière d'obscénité sont très limitées. Le tableau VI fournit les données seulement de certaines parties de la Colombie-Britannique et du Québec, et seulement pour les années s'échelonnant de 1978 à 1980<sup>98</sup>. Il nous permet toutefois d'avoir une idée assez juste de la politique en matière de condamnations. Une amende est presque toujours imposée après déclaration de culpabilité. La seule peine de prison relevée ici tient du mystère. Nadin-Davis et Sproule ne nous donnent aucun exemple pratique de la possibilité de choisir l'emprisonnement dans leur Canadian Sentencing Digest<sup>99</sup>; bien que cette possibilité existe vraiment, il est très difficile

98 M.J. Parlor, premier analyste, Programme des tribunaux, du Centre canadien des statistiques judiciaires écrit: "On doit souligner le fait qu'il y a, à l'égard des données, de graves problèmes de méthodologie. Le cadre limité (qui varie chaque année), les rapports incomplets et les méthodes d'échantillonnage différentes sont autant d'exemples des problèmes qu'on rencontre".

99 Nadin-Davis, R.P. et Sproule, C.B. Canadian Sentencing Digest, Toronto, Carswell, 1982, 39-1, 39-2.



La figure I révèle qu'il y a eu récemment une augmentation des délits d'obscénité qui touchent le public; si nous en jugeons par l'enversure du problème à l'heure actuelle, nous pouvons nous attendre à une autre augmentation du nombre des infractions rapportées ou connues de la police en 1983 et 1984. Il est intéressant de noter à la figure II une diminution importante du nombre des infractions rapportées et considérées comme sans fondement par la police; la figure III représente les infractions résolues, c'est-à-dire celles qui paraissaient fondées au premier abord et pour lesquelles ou bien des procès ont été intentés à des particuliers ou à des maisons d'affaires ou bien les procédures ont été abandonnées pour des raisons non reliées à leur validité. La représentation graphique de ces accusations nous permet de constater une hausse modérée, sinon constante, au cours des cinq dernières années.

La figure IV est peut-être celle qui nous donne les meilleurs indices sur la censure en matière d'obscénité; au cours des sept dernières années, il y a eu une moyenne annuelle de 200 à 250 Canadiens accusés d'obscénité. Alors qu'une plus grande centralisation de la distribution de matériel potentiellement obscène pouvait signifier plus d'infractions et proportionnellement moins de délinquants, nous devons admettre ici que la lutte contre les infractions, traduite en personnes accusées, a été relativement statique au cours des sept dernières années. Les figures V à XIV nous font voir que toutes les provinces n'ont pas connu la même stabilité dans le nombre des infractions. À Terre-Neuve, au Nouveau-Brunswick, à l'Île-du-Prince-Édouard, en Nouvelle-Écosse et en Saskatchewan, le nombre de personnes accusées est resté relativement bas au cours des neuf dernières années. La part du lion quant aux accusations d'obscénité revient à l'Ontario; c'est dans cette province que se retrouvent plus de la moitié de toutes les personnes accusées au Canada. En 1982, il y a eu une accusation au Québec contre quatre en Ontario alors que ces deux provinces ont sensiblement la même population. Au cours des trois dernières années, le nombre de personnes accusées d'obscénité en Colombie-Britannique et au Manitoba a augmenté de façon constante pendant que les personnes accusées du même délit diminuaient sans cesse en nombre au Québec.

Assez ironiquement, la partie du public qui pourrait bénéficier davantage de cette polémique stimulante est exclue d'un tel énoncé. La présentation dans les salles commerciales attire un public plus nombreux élargissant de la sorte la portée potentielle du film. Si le Board se défendait sans doute de vouloir définir un film par trop explicitement sexuel comme un divertissement, son raisonnement n'en demeure pas moins difficile à suivre. Mais revenons à la question de savoir ce qui doit vraiment faire l'objet de la censure, question qui constitue le coeur du problème que doivent résoudre les pouvoirs de censure provinciaux et la loi criminelle en matière d'obscénité.

#### Obscénité et censure: une question de perception

Dans le cadre des paramètres théoriques et pratiques de l'obscénité et de la censure, le contexte actuel d'application de la loi fournit une bonne toile de fond pour l'analyse. La figure 1 nous donne une idée des délits criminels d'obscénité qui touchent le public. Bien que les données fassent référence à la catégorie plus générale des infractions qui tendent à corrompre les moeurs du public, nos discussions avec de nombreux procureurs de la Couronne nous font supposer que la majorité des accusations relèvent essentiellement du par. 8 de l'art. 159 du Code criminel. Ces données de la police offrent donc une bonne approximation de la façon dont la loi sur l'obscénité a été appliquée au cours des neuf dernières années<sup>97</sup>.

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97 Des données de police pertinentes, relativement aux "infractions tendant à corrompre les moeurs publiques", ne sont pas disponibles pour les années antérieures à 1974.

"Même si l'étiquette de "pornographie dure" pouvait être accolée au long métrage Not a Love Story et empêchait sa présentation dans les salles publiques et commerciales de l'Ontario, le Board a approuvé le projet de commercialisation original de l'Office national du film de le distribuer et de le présenter comme film éducatif"96.

TABLÉAU V : DÉCISIONS DES BUREAUX PROVINCIAUX À L'ÉGARD DE CERTAINS LONGS MÉTRAGES

Film	C.-B.	Ontario	Nouvelle-Écosse	Québec
La Petite	Approuvé	Rejeté	Approuvé	Approuvé
Beau Père	Approuvé	Rejeté	Non soumis	Approuvé
Caligula	Approuvé (version américaine)	Approuvé (version britannique coupée)	Rejeté	Approuvé (version américaine coupée)
Not a Love Story	Exempté	Non approuvé	Non approuvé	Approuvé pour présen- tation publique

96 Lettre au Dr Robert Elgie, Minister of Consumer and Commercial Relations, adressée le 21 juin 1982 par Mary Brown, directrice, Theatres Branch, p. 3.

au public une plus grande participation dans l'examen minutieux des films<sup>94</sup>. Mais ni le Bureau du Québec ni celui de la Nouvelle-Écosse ne sont critiques pour leur négligence à apporter des réponses aux problèmes que le public peut soulever. Au contraire, le Bureau de surveillance du cinéma du Québec a été félicité par la critique pour avoir répondu avec beaucoup d'égards et de sensibilité aux questions qui préoccupaient la population; l'Amusements Regulation Board de la Nouvelle-Écosse reçoit également le soutien énergique de la population.

Toutefois, c'est par leurs décisions dans des cas individuels que sont jugés, en dernier ressort, les Bureaux provinciaux. Parmi les films les plus controversés ces derniers temps, se trouvent *La Petite*, *Beau Père*, *Caligula* et *Not a Love Story*. Le tableau V indique comment les différents Bureaux ont jugé ces films<sup>95</sup> et nous fait voir que différentes versions sont, en effet, envoyées aux différents Bureaux et que les opinions sur un seul film peuvent être fort différentes. Fait intéressant, le film *Not a Love Story*, un documentaire sur l'aspect "exploitation" de la pornographie, renferme des scènes explicites de sexualité; il y a, entre autres, une scène de fellatio et de pénétration. Le but du film justifie ces scènes. L'Ontario et la Nouvelle-Écosse ont autorisé la présentation du film à des fins d'enseignement. Mary Brown du Board de l'Ontario a fait la remarque suivante en juin 1982:

94 Ces problèmes s'apparentent nettement à ceux soulevés par la Cour de division de l'Ontario et la Cour d'appel de l'Ontario, dans l'affaire Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 1 ci-dessus, note 83 ci-dessus.

95 Ce tableau est tiré d'un rapport préparé par Peter Petruzzellis, *Compilation and Review of Notes, Theatre Branches Across Canada*, septembre 1982. Le rapport Petruzzellis fait la comparaison des films *La Petite*, *Beau Père* et *Caligula*.



parmi les résidents adultes. Le problème peut aussi être compris en fonction de la notion d'une masse critique. Dans les régions les plus urbanisées du Canada, il y a une plus grande tolérance, ou demande, pour la présentation régulière de films pornographiques. Si la Nouvelle-Écosse devait donner son consentement à la représentation publique de scènes explicites de sexualité, il pourrait y avoir une résistance farouche à cette décision, nonobstant le critère de nocivité; il est facile de comprendre que l'Amusements Regulation Board ne veut pas créer de controverse publique. Nous ne pouvons négliger l'importance des sentiments de la population qui constituent un facteur essentiel lorsqu'il faut décider d'interdire la présentation publique de films. La création d'un critère de tolérance collective demeure problématique, mais le rôle souvent conducteur de la réaction du public doit être reconnu.

Vue sous cet angle, la question de la responsabilité des bureaux de censure peut être soulevée plus équitablement. Le public doit pouvoir découvrir ce qui a été supprimé d'un film, et pourquoi<sup>93</sup>. Le droit de savoir du public persiste malgré les critères de nocivité et un critère de tolérance collective. À cet égard, les politiques de l'Ontario et de la Colombie-Britannique relativement à l'accès du public constituent un modèle à imiter. En effet, l'Ontario présente sa politique de façon particulièrement explicite, indiquant les scènes précises à supprimer. Bien que les décisions de l'Ontario, en soi, ne soient pas au-dessus de toute critique, la responsabilité de la province envers le public crée effectivement un modèle pour les autres juridictions. La politique actuelle du Québec et de la Nouvelle-Écosse ne donne aucun mandat au public dans le processus de la prise de décisions. La réglementation publique devrait avoir comme pendant la responsabilité du public; il semble raisonnable de proposer qu'il y ait de nouvelles politiques pour accorder

93 Voir conclusion V, ci-dessous.



raisons qui président au rejet d'un film, le Bureau est plutôt franc au sujet de ses décisions en matière de censure. La sexualité explicite entre des adultes consentants est considérée comme une forme acceptable ou tolérable de divertissement public; la sexualité, en soi, ne fait pas l'objet de coupures. Jean Tellier mentionne que les images qui sont considérées comme intolérables sont celles de la violence sexuelle, dans les films genre "exploitation". Monsieur Tellier souligne que le Bureau doit aussi être sensible à la nature changeante des normes de la société et que des critères précis et inflexibles ne sont tout simplement pas réalistes. Contrairement à la Colombie-Britannique, le Québec permet la présentation de films qui comprennent des scènes de pénétration et d'éjaculation. Le Bureau ne compile pas de statistiques sur les films coupés ou rejetés, en soutenant que les chiffres seraient sans signification. Un film peut être rejeté plusieurs fois avant d'être finalement accepté; le nombre de rejets donnerait alors peu d'indices sur la politique du Bureau. Jean Tellier souligne que le Bureau ne fait pas de demandes expresses relativement aux coupures, ce sont les distributeurs de films qui prennent la décision de couper.

Ce portrait des normes provinciales en ce qui concerne la censure soulève des questions nombreuses et intéressantes. Toutes les provinces sont fortement attachées à la notion d'une norme de tolérance collective, mais il n'y a cependant aucun système permettant de prendre le pouls du public, à l'exception du sondage fait en 1979 par Market Facts de l'Ontario. Les données révélaient qu'en Ontario la majorité des adultes n'accepteraient pas la sexualité explicite comme divertissement public. Dans la mesure où le rôle du Board n'est que de refléter la volonté du public, les suppressions qu'il fait actuellement apparaissent comme la lecture intelligente des sentiments de la collectivité.

Mais il est toutefois difficile de bien définir le rôle de la "tolérance de la société". Bien que l'expression suppose un consensus d'opinions en-deçà des limites de la province, le sondage effectué en Ontario confirme qu'il n'y a pas qu'une seule définition de la tolérance

d'éjaculation ou soit des deux; trois des 17 films contenaient des scènes de violence inacceptable<sup>91</sup>.

Le Nova Scotia's Amusements Regulation Board mentionne que "Le rejet d'un film est possible lorsqu'il n'y a pas de véritable histoire mais une représentation explicite et prolongée de l'activité sexuelle, une exploitation sexuelle des enfants, des scènes indues et prolongées de violence, de torture, d'effusion de sang, de mauvais traitements envers les animaux, des scènes mettant l'accent, de façon indue et prolongée, sur les organes génitaux"<sup>92</sup>.

La province suit l'exemple de l'Ontario en ce qu'elle ne permet pas la représentation explicite de l'activité sexuelle comme une forme de divertissement public. Le président du Board, Don Trivett, fait remarquer que la Nouvelle-Écosse est une province plus petite et un peu plus conservatrice que l'Ontario, le Québec et la Colombie-Britannique, la norme de tolérance de la collectivité reflétant conséquemment ces différences de structure. Contrairement à la Colombie-Britannique et à l'Ontario, la Nouvelle-Écosse n'expose pas au public les raisons de ses décisions relatives aux suppressions ou aux rejets. L'Amusements Regulation Board et le Department of Consumer Affairs disent que l'exposé de leur politique relative aux rejets, dont nous avons fait mention ci-dessus, fournit suffisamment de détails.

Au Québec, la politique du Bureau de surveillance du cinéma est restée essentiellement intacte au cours des vingt dernières années. André Gauthier, Pierre Saucier et Jean Tellier forment l'épine dorsale de l'organisme. Bien que le Québec, comme la Nouvelle-Écosse, n'expose pas au public les

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91 Eliminations, avril 1984, Film Classification Branch British Columbia.  
92 Classification Parameters, 1984, Amusements Regulation Board, Nova Scotia.

demandées révèle que la sexualité et la violence sont perçues comme formant des problèmes indépendants. L'Elimination Report de janvier 1984 donne une idée de ce que l'Ontario interdit; le Board a donné les instructions suivantes relativement à six films différents:

"Éliminez la scène où un homme se fait couper le cou avec un couteau; établissez et raccourcissez la scène où une hache est utilisée pour tailler en morceaux le corps d'un homme et de femmes; éliminez toutes les images qui, dans la scène de copulation, montrent les hanches en mouvement; supprimez le gros plan du pénis en érection enroulé d'un préservatif; éliminez la scène de la langue dans le rectum; supprimez la scène des fesses écartées laissant voir le rectum; supprimez la scène prolongée du pénis en gros plan; supprimez la scène où les hommes reçoivent des coups sur leurs fesses nues; supprimez la scène explicite du contact de la bouche et du nez avec le rectum"90.

En Colombie-Britannique, les normes de censures découlent également d'inquêtes au sujet d'images sexuelles et de violence. Les rapports mensuels révèlent, toutefois, que la "pénétration", "l'éjaculation" et la "violence" sont les trois variantes qui préoccupent la censure. Mary Louise McCausland, membre de la Branch depuis 1976 et directrice depuis 1978, dit que ces variantes représentent une sorte d'équilibre de la tolérance de la société. La Branch avait commencé à permettre graduellement des scènes de sexualité explicite entre adultes consentants, mais s'est montrée sensible aux réactions négatives du public face au film Caligula. Suite à ces réactions, elle a fini par adopter une politique plutôt unique, permettant des scènes explicites de fellatio et de cunnilingus et interdisant en même temps des scènes de pénétration et d'éjaculation. Le rapport mensuel portant sur les suppressions du mois d'avril 1984 indique que 14 films sur 17 ont été coupés en raison soit de scènes de pénétration, soit de scènes

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90 Theatres Branch Elimination Report, janvier 1984, Ministry of Consumer and Commercial Relations, Ontario.

Mais c'est ici que les données disponibles doivent être confrontées avec la réalité des méthodes en cours. Le seuil de tolérance varie considérablement d'une province à l'autre. La question des interdictions et de toute première importance pour ceux d'entre nous qui s'intéressent au départage des responsabilités des gouvernements provinciaux et fédéral en matière d'obscénité et de censure.

Il faut d'abord souligner que les distributeurs de films exercent eux-mêmes une bonne part de la censure. Ils sont au courant des paramètres de la politique de chaque Bureau, ils envoient aux bureaux de censure des versions différentes du même film selon la philosophie propre à chaque Bureau; certains films ne peuvent tout simplement pas être présentés dans toutes les provinces.

La directrice du Board of Censors de l'Ontario, Mary Brown, a fait savoir que: "les scènes très vivantes et prolongées de violence, de torture et d'effusion de sang, la description explicite de la violence et de l'activité sexuelle, les scènes mettant indûment et longuement l'accent sur les organes génitaux, les scènes de violence faite aux animaux seraient en général considérées comme contraires aux normes de la collectivité et donneraient lieu à des coupures exigées par le Board"89.

À titre de directrice et de présidente du Board of Censors depuis 1980, Madame Brown rejette la notion que la sexualité explicite peut être tolérée comme divertissement public, rompant ainsi avec ses collègues de la Colombie-Britannique et du Québec.

Toutefois, ce qui préoccupe davantage Madame Brown, ce sont les films qui exploitent le thème sexualité et enfants en même temps que ceux illustrant la violence et la violence sexuelle. L'étude des coupures



TABLERAU I : LONGS METRAGES, COLOMBIE-BRITANNIQUE

N. de films examinés	Films avec coupures	Films rejetés
1979	764	45
1980	672	14
1981	580	18
1982	561	21
1983	531	89
		1

TABLERAU II : LONGS METRAGES, ONTARIO

N. de films examinés	Films avec coupures	Films rejetés
1978-79	1060	146
79-80	1339	141
80-81	1154	58 (35 mm seulement)
81-82	1112	82 (35 mm seulement)
82-83	1050	109 (35 mm seulement)
		46 (35 mm seulement)
		46
		5
		4
		4

TABLERAU III : LONGS METRAGES, NOUVELLE-ECOSSE

N. de films examinés	Films avec coupures	Films rejetés
1977-78	468	Données non disponibles
78-79	382	Données non disponibles
79-80	283	Données non disponibles
80-81	247	Données non disponibles
81-82	256	Données non disponibles
		Non disponibles
		Non disponibles
		Non disponibles
		Non disponibles

TABLERAU IV : LONGS METRAGES\*, QUÉBEC

N. de films examinés	
1978-79	890
79-80	841
80-81	970
81-82	910
82-83	868

\* Données relatives aux coupures et aux rejets non disponibles



Il est difficile de faire des comparaisons. Nous avons concentré nos efforts sur les longs métrages de 35 ou 16 mm visionnés dans chaque province, exception faite des courts métrages, des films annonces et autres films de ce genre; les grands films sont ceux qui sont examinés avec le plus de soin par le public. Le manque d'uniformité dans la cueillette des données complique et limite nos efforts. Comme les données couvrent des périodes différentes dans des provinces différentes, et que les bases de comparaison ont changé avec le temps, l'interprétation de ces chiffres doit se faire avec beaucoup de circonspection<sup>88</sup>.

Il y a, toutefois, possibilité de faire certaines remarques. Il semble évident que le nombre de films évalués dans chaque province a peu diminué au cours des dernières années; les chiffres donnés permettent aussi de saisir l'étendue plus ou moins grande des activités de chacun des Bureaux. Le rapport de comparaison des films examinés en Nouvelle-Ecosse et en Ontario s'établit à un contre quatre; la comparaison faite avec la Colombie-Britannique et le Québec donne un rapport qui se situe à mi-chemin, les chiffres du Québec se rapprochant davantage de ceux de l'Ontario. Il semble aussi qu'au cours des dernières années, l'Ontario et la Colombie-Britannique aient connu une augmentation importante du nombre total de films rejetés et par les bureaux de censure provinciaux.

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88 Nous ne supposons pas que les données des tableaux I à IV fournissent des bases de comparaison équivalentes; le principe de l'autonomie provinciale exclut toute analyse en ce sens.

d'opinions au sujet d'un film, un délai de 24 heures peut être accordé, mais c'est à l'unanimité que sera prise la décision finale; il y a aussi la possibilité qu'un troisième membre voit le film et fasse en sorte qu'on arrive à un accord. La Régie du cinéma n'apportera pas beaucoup de changements à la pratique actuelle; il y a peu de raisons de penser que la loi sur le cinéma signifiera une rupture avec le statu quo.

Le Bureau de censure de chaque province accorde une certaine importance à la question des normes de la collectivité, mais cette dernière notion demeure problématique. Les données de Market Facts révèlent qu'en Ontario plus de 60 pour cent des adultes pensent qu'on doit interdire les films qui montrent explicitement des scènes de relations sexuelles; 49 pour cent croient qu'on doit condamner l'emploi de jurons ou de mots vulgaires<sup>87</sup>. Les données indiquent, en même temps, que seulement sept pour cent des Ontariens se disent préoccupés par le sexe au cinéma.

Il faut examiner plus attentivement ce qui fait la cible de la

censure; en soi, le critère des normes de la société ne donne pas à l'autorité, soit-elle provinciale ou fédérale, des justifications ou des explications suffisantes pour censurer.

L'Ontario, le Québec, la Nouvelle-Écosse et la Colombie-Britannique ont tracé des frontières bien différentes en exerçant leur pouvoir de décision quant à l'interdiction, la suppression et la classification des films à présenter au public.

Les quatre tableaux ci-après présentent les données disponibles sur les activités des quatre Bureaux. Bien qu'il y ait peu de d'uniformité dans la tenue des dossiers des provinces à l'étude, les chiffres donnés contribuent, bien que modestement, à nous faire comprendre les méthodes de censure et de classement.

Un modèle analogue prévaut en Nouvelle-Écosse. La province dispose de neuf membres du Board pour visionner chaque film divisés en jurys de quatre personnes. Le président Don Trivett fait remarquer que les membres sont nommés au Board conformément au principe de la représentativité. Il y a des divergences d'opinions parmi les membres du Board, mais lors de la prise de décisions, l'accent est mis de préférence sur le consensus que sur un verdict non-unanime<sup>85</sup>. Dans l'éventualité de controverses ou de difficultés au sujet de la censure ou de la classification, le Board en entier peut être appelé à former le jury.

En Colombie-Britannique, les membres sont aussi choisis par nomination, bien que les trois responsables de la classification aient des postes à temps plein; en Nouvelle-Écosse, huit membres du Board sur neuf sont à temps partiel, en Ontario, 12 sur 15 et au Québec trois sur six. La plupart du temps en Colombie-Britannique, chaque film est visionné par les trois responsables de la classification; le modèle choisi pour la prise de décisions est, comme en Nouvelle-Écosse, celui qui favorise le consensus par rapport au verdict non-unanime. En dépit de désaccords observés dans environ 10 pour cent des décisions de classement, c'est une déclaration de position unanime qui émerge finalement de la Branch.

Au Québec, les six membres du Bureau de surveillance du cinéma sont choisis par nomination. Un jury de deux membres fait l'évaluation de chaque film. Les membres du Bureau doivent satisfaire à trois conditions: détenir un diplôme universitaire en sciences humaines ou sociales, être passionné de cinéma et être engagé dans des activités communautaires<sup>86</sup>. Tout comme en Colombie-Britannique et en Nouvelle-Écosse, la préférence est donnée au consensus dans la prise de décisions. S'il y a divergence

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85 Il y a néanmoins dans les deux cas, consensus ou verdict non-unanime, un sentiment partagé de tolérance vis-à-vis les décisions prises, ce qui est bien nécessaire pour un engagement soutenu dans le processus.

86 Conversation privée avec Jean Tellier du Bureau de surveillance du cinéma, Québec, avril 1984.

La ligne de démarcation entre la sphère de responsabilité provinciale et celle du fédéral n'est pas rigide, mais c'est dans ce contexte que les pouvoirs de prohibition des bureaux de censure provinciaux peuvent être le plus utiles. À supposer que les bureaux n'aient pas pouvoir de prohiber, l'obscurité serait définie de façon plus directe par les intérêts de la police, bien que dans un cadre judiciaire et législatif fixé par le fédéral. La révocation des pouvoirs de censure provinciaux éliminerait les freins et contre-poids qui font maintenant partie des relations entre les bureaux de censure et la police.

Ne parler ici que de juridiction équivalente, en pratique, à passer à côté de ce qui fait l'essence même de la prise de décisions par les bureaux de censure. Les détails législatifs portant sur les pouvoirs des bureaux de censure ne permettent pas de saisir les raisonnements qui sont à l'origine des coupures, des interdictions et de la classification. C'est ce qui donne une impression d'arbitraire dont se sont inquiétées la Cour de division et la Cour d'appel de l'Ontario dans Re Ontario Film and Video Appreciation Society c. Ontario Board of Censors<sup>83</sup>.

Chacun des quatre bureaux provinciaux veille à ce que la collectivité soit représentée dans une certaine mesure lors des procédures d'évaluation des films soumis. En Ontario, quinze membres du Board, répartis en jurys de cinq à sept personnes, sont appelés à visionner chaque film; c'est le verdict de la majorité qui décide de l'approbation, du rejet et de la classification. Selon le Board of Censors, "... les membres sont représentatifs de la collectivité et fournissent un échantillonnage varié quant à l'âge, la philosophie, les antécédents, le mode de vie et l'origine ethnique"<sup>84</sup>. En 1982-83, le Board s'est mis en rapport avec plus de 7500 Ontariens; le Board of Censors prend connaissance de l'opinion de la collectivité grâce aux évaluations qui lui sont présentées lors de ses réunions plénières trimestrielles.

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<sup>83</sup> Voir Re, Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 1 ci-dessus, de même que la décision de la Cour d'appel de l'Ontario, février 1984, non consignée

<sup>84</sup> Voir note 73 ci-dessus, p. 13.



Il est cependant difficile de faire la distinction entre la présentation de films et la vente ou location de films vidéo. Par le biais du classement par catégories et d'avertissements écrits, la province peut désirer limiter les occasions de voir des films vidéo pouvant causer du tort; il semble que les Regulations Respecting Film Exchanges<sup>81</sup> de la Nouvelle-Ecosse soient un pas dans cette direction.

La difficulté d'évaluer les différents critères de prohibition est certes réelle, mais il est possible de formuler assez simplement la question à débattre: un adulte consentant doit-il avoir, à tout prix, la permission de voir à domicile des vidéo qui ne pourraient pas lui être présentées dans un cinéma? La censure provinciale a souvent fait l'objet de protestations pour des raisons de pureté juridique et pour le motif qu'elle occupe le territoire fédéral délimité par le paragraphe 8 de l'article 159 du Code criminel. En effet, la décision d'interdire l'accès public est essentiellement une décision prise après condamnation au criminel; une forme quelconque d'affichage public est un préalable pour demander l'intervention des tribunaux<sup>82</sup>.

Nous croyons que la confusion naît ici d'une analyse trop succincte des responsabilités et du rôle des provinces en ce qui concerne l'obscénité et la censure. Les provinces et le gouvernement fédéral partagent la responsabilité quant à l'élaboration de la définition de l'obscénité. La terminologie juridique de l'article 159 et les prononcés de la Cour suprême relatifs au délit d'obscénité ne sont pas assez détaillés pour fournir aux provinces un plan d'action efficace dans chaque cas individuel. Conséquemment, les procureurs de la Couronne, les procureurs de la province régionaux et, en dernier ressort, le procureur général de la province doivent apporter et l'essentiel et les détails pour définir l'obscénité.

81 Voir note 79 ci-dessus.

82 En général, la possession privée de matériel pornographique n'est pas visée par la Loi telle qu'elle est rédigée. Voir, toutefois, Re Hawkshaw and the Queen (1982) 69 C.C.C. (2<sup>e</sup>s) p. 503 (C.H. Ont.).



conformes à la Theatres and Amusements Act ont récemment prévu un certain droit de regard sur la vente et la location de "films vidéo". L'article 8 prévoit que "chaque club doit indiquer ... à l'intention de ses clients la cote et les légendes, s'il y a lieu, données aux films par le Bureau, et dans le cas de films non classés, il doit y avoir une mention à cet effet"<sup>79</sup>. Bien qu'il ne contienne pas de prescription pour obliger les distributeurs de vidéo à soumettre leurs bandes à la classification, l'article exige que le consommateur de la Nouvelle-Écosse soit mieux renseigné au sujet de la catégorie de quelque "vidéocassette, vidéodisque ou bande magnétoscopique" que ce soit.

La question épineuse de la compétence juridictionnelle dans le cas de présentation de vidéo à domicile semble être un sujet auquel s'intéresse le bureau de censure respectif de chacune des quatre provinces à l'étude. Bien que la province d'Ontario ait signifié qu'elle allait soumettre à la censure et à la classification provinciales les films vidéo présentés à domicile<sup>80</sup>, le Québec, la Nouvelle-Écosse et la Colombie-Britannique n'ont pas encore emboîté le pas. Il semble important de faire ici une distinction entre divertissement public et divertissement privé. Si les cinémas sont source d'expériences partagées en public, la maison privée est alors source d'expériences en privé. La loi criminelle peut déjà être invoquée contre les distributeurs de films vidéo; le recours à la juridiction provinciale est sans contredit la duplication coûteuse d'un mécanisme de surveillance qui existe déjà.

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79 Regulations Respecting Film Exchanges, Nova Scotia, 1984, en application du paragraphe 1 de l'article 2 de la Theatres and Amusements Act, note 77 ci-dessus, article 8.

80 "Videotapes face censors in Ontario", The Globe and Mail, 5 mai 1984, p. 1.

Les pouvoirs de la Régie du cinéma sont prévus à l'article 81, dont le vocabulaire juridique s'écarte, et de beaucoup, de celui de l'Ontario, de la Colombie-Britannique et de la Nouvelle-Écosse. "La Régie ... si elle est d'avis que le contenu du film ne porte pas atteinte à l'ordre public ou aux bonnes moeurs, notamment en ce qu'il n'encourage ni ne soutient la violence sexuelle, la classe dans l'une des trois catégories suivantes, selon les spectateurs auxquels il s'adresse: 1) visa général, 2) 14 ans et plus, 3) 18 ans et plus"<sup>76</sup>. La loi sur le cinéma exige qu'il y ait démonstration de nocivité, dans le cas d'interdiction de représentation publique. Alors que c'est un système de classement qui est utilisé pour réglementer la nature offensante éventuelle des films, l'interdiction, pour sa part, dépend de facteurs ainsi libellés: porter atteinte aux bonnes moeurs ou encourager et soutenir la violence sexuelle. La prévention de torts éventuels est la notion centrale de la compétence du Québec en matière de surveillance du cinéma, du moins en ce qui a trait au vocabulaire juridique.

La Theatres and Amusements Act<sup>77</sup> de la Nouvelle-Écosse prescrit que: "Le Bureau doit avoir le pouvoir de permettre ou d'interdire a) l'usage ou la présentation en n'importe quel point de la Nouvelle-Écosse de tout film pour divertir le public et b) toute représentation dans les cinémas ...". L'alinéa g) de l'article 1 de la loi définit la représentation comme: "... tout spectacle ou représentation de théâtre, de musique, de variétés ou de cinéma à des fins de divertissement public"<sup>78</sup>. Le classement se fait selon trois catégories: pour tous, accompagné d'un adulte obligatoire si moins de 14 ans, et entrée réservée aux 18 ans et plus. Des règlements

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<sup>76</sup> Ibid., art. 81.

<sup>77</sup> Revised Statutes of Nova Scotia, 1967, Theatres and Amusements Act, c. 304.

<sup>78</sup> Ibid., art. 7 alinéa g).

de l'article 6 dispense le gouvernement tant fédéral que provincial, les universités, les sociétés de cinéma et certaines institutions

d'enseigner de l'observation de la loi. Les pouvoirs accordés aux censeurs de l'Ontario sont prévus à l'alinéa b) du 2<sup>e</sup> paragraphe de l'article 3 de la Theatres Act, "sous réserve de la réglementation, approuver, interdire ou réglementer la présentation de tout film en

Ontario"72.

La classification en vigueur en Ontario comprend quatre catégories: obligatoire et réservé aux 18 ans et plus73. La catégorie "accompagnement par un adulte" prescrit que les enfants de moins de 14 ans pourront être admis seulement s'ils sont accompagnés d'un adulte; cette catégorie se rapproche beaucoup de la catégorie des films avec réserves établie par la Colombie-Britannique, sauf que dans ce dernier cas, il s'agit d'enfants de moins de 18 ans.

La nouvelle Loi sur le cinéma du Québec prévoit que "nul ne peut ... présenter un film en public si un visa attestant son classement n'a pas été apposé sur la copie de ce film conformément à la présente Loi"74. L'article 77 apporte une exception à la norme: "La Régie peut, aux conditions qu'elle détermine, livrer une autorisation spéciale permettant de présenter en public les films qu'elle indique, lors d'une manifestation diplomatique, d'un festival ou de tout autre événement analogue"75.

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72 Ibid., art. 3 paragraphe 2 alinéa b).

73 Ontario, Ministry of Consumer and Commercial Relations, Theatres Branch Annual Report, 1982-1983, pp. 14-15.

74 Québec, projet de loi 109, Loi sur le cinéma 1983, sanctionné le 23 juin 1983, non encore adopté. Bien que la Loi sur le cinéma ne soit pas encore en vigueur au Québec, nous avons décidé d'en parler ici comme du meilleur exemple possible de la politique de la province à l'heure actuelle.

75 Ibid., art. 77.

Les personnes de moins de 18 ans; c) avec réserves, convenant seulement aux personnes de 18 ans et plus<sup>69</sup>. Fait intéressant, le paragraphe 3 de l'article 8 prescrit de plus qu'une personne de moins de 18 ans peut voir un film "avec réserves" à condition d'être accompagnée de "... ses parents ou de toute autre personne adulte responsable", l'article s'appuyant sur l'importance du choix individuel de l'adulte dans la décision de permettre l'accès au cinéma.

La Motion Picture Act accorde des pouvoirs à la fois de censure et de classification; en pratique, les films peuvent être complètement rejetés ou encore acceptés après coupures mais seront toujours classés dans l'une des catégories suivantes: a) pour tous; b) pour adultes; c) réservé aux plus de 18 ans. Le cadre de censure législatif est sensiblement le même en Ontario, au Québec et en Nouvelle-Écosse; le pouvoir de rejet et de classification existe dans les quatre provinces. Mais c'est sur ce point que prend fin toute similitude; les provinces ont adopté des approches différentes quant à la restriction préalable, ne serait-ce que dans leur phraseologie juridique.

La Theatres Act de l'Ontario ordonne "que nul ne doit présenter ou être cause de présentation de films en Ontario qui n'ont pas été approuvés par le Board"<sup>70</sup>. L'alinéa c) de l'article 1 de la Loi définit ainsi la présentation: "... lorsqu'employé relativement aux films de cinéma, le terme (présentation) signifie présenter des films pour visionnement à des fins de profits directs ou indirects, ou pour visionnement par le public..."<sup>71</sup>. L'article donne plus d'extension à sa définition que ne le fait la Motion Picture Act de la Colombie-Britannique dont le paragraphe 2

69 Ibid., paragraphe 2 art. 8.

70 Revised Statutes of Ontario, 1980, The Theatres Act, C. 498, art. 38.

71 Ibid., art. 1 alinéa c).



Prise de décisions par les Bureaux de censure:  
élaboration des normes de la société

Contrairement à l'autorité fédérale en matière d'élaboration des lois criminelles, la maîtrise du processus de restriction préalable des provinces est plus carrément soumise au critère des "normes de la société". Il ne s'agit pas ici de décider de la prohibition mais de déterminer le contexte dans lequel l'accès peut prendre place. Dans le cadre de la classification des représentations publiques, l'intolérance de la société fournit un guide utile de réglementation essentielle. L'accessibilité aux représentations privées n'entre pas jusqu'à ce jour, dans les limites de la compétence des Bureaux de censure de la Colombie-Britannique, de l'Ontario, du Québec et de la Nouvelle-Écosse<sup>66</sup>.

La Motion Picture Act de la Colombie-Britannique prescrit que: "... tout film devant être présenté ou affiché dans un cinéma de la province doit être soumis en premier lieu à l'approbation du directeur"<sup>67</sup>. Les pouvoirs de ce dernier sont expliqués à l'alinéa c) de l'article 4: il ou elle peut "sous réserve de cette Loi, approuver, interdire ou réglementer la présentation ou l'affichage d'un film dans la province"<sup>68</sup>. Les pouvoirs de la Colombie-Britannique sont exposés en détail au paragraphe 2 de l'article 8; la Loi prescrit que les films approuvés appartiendront à l'une des catégories suivantes: "a) visa général, convenant à tous; b) adultes, ne convenant pas aux ou d'aucun intérêt pour

66 Conformément à l'argumentation ci-dessous, il est toutefois difficile de délimiter la frontière entre la sphère publique et la sphère privée. Il n'est pas certain que le critère de prohibition doit être manifestement différent dans les deux cas. Voir plus bas Obscénité et censure: une question de perception.

67 Revised Statutes of British Columbia, 1979, The Motion Picture Act, c. 284, art. 6.

68 Ibid., alinéa c) art. 4.



Le critère des normes de la société reste tout de même problématique. Alors que le critère Hicklin exige que les juges croient en la nocivité d'une prétendue obscénité, la disposition statutaire actuelle soumet la criminalisation au critère de la nature offensante. Le Toronto Area Caucus of Women and the Law a dit que: "... L'obscénité est une notion vague et changeante. Au moment où la représentation du sado-masochisme devient plus courante dans notre société, on dirait sans doute que la "norme de tolérance de la société" a de plus en plus tendance à accepter le sado-masochisme. Au contraire, nous trouvons que la violence contre les femmes est fondamentalement inacceptable"<sup>64</sup>.

Cette remarque est très juste, pour autant qu'elle critique la logique sur laquelle s'appuie actuellement la criminalisation de l'obscénité. La criminalisation de l'obscénité doit sûrement être plus qu'un indice de la tolérance de la société. La question du tort social ne doit pas pouvoir échapper à la rhétorique judiciaire. Une enquête menée en 1979 par Market Facts a établi qu'alors que 61 pour cent des Ontariens couperaient ou interdiraient des scènes de "relations sexuelles explicites" et de "violence vivement dépeinte", 67 pour cent couperaient ou interdiraient des scènes de "sexe entre deux femmes ou deux hommes"<sup>65</sup>. Le critère d'intolérance de la société peut alors révéler un manque de cohérence dans la moralité qu'elle épouse. Comme nous abordons le sujet de la prise de décisions par les bureaux de censure, nous verrons mieux les limites du critère de tolérance en tant qu'arbitre final du processus de criminalisation.

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64 Toronto Area Caucus of Women and the Law, note (15) ci-dessus, p. 27.

65 Market Facts of Canada, A Study of Attitudes in Ontario, Censure et classification des films. Rapport rédigé pour le compte du Ministry of Consumer and Commercial Relations, p. 19.

paramètres en statuant dans l'affaire Regina c. Prairie Schooner News Ltd.  
and Powers<sup>61</sup>: "... la "collectivité" dont les normes sont prises en  
considération est celle de tout le Canada. L'univers à partir duquel  
l'échantillon" ... doit être prélevé se doit d'être représentatif de tout  
le Canada et non d'une seule ville"<sup>62</sup>.

Dans l'affaire R. c. Pink Triangle Press<sup>63</sup>, la Cour d'appel de

l'Ontario a décidé qu'il n'était pas nécessaire que les sondages d'opinion  
sur les normes de la société fissent partie des preuves apportées par la  
Couronne et que c'était finalement le devoir de la Cour de définir la  
question légale de la tolérance de la société. Bien que la norme de  
tolérance de la société canadienne soit soumise au critère empirique, les  
procureurs de la Couronne et les avocats de la défense ont montré, de  
toutes sortes de façons, leur répugnance à se lancer dans la bagarre.  
L'établissement par le pouvoir judiciaire, de la nécessité d'une  
méthodologie stricte et les coûts de la recherche empirique subséquente ont  
eu tendance à travailler contre toute présentation régulière de preuves  
tirées des sondages d'opinion. Est implicite dans cette analyse judiciaire  
la notion qu'une recherche capable de n'importe quelle critique  
méthodologique ne peut pas être utile aux tribunaux; le pouvoir judiciaire  
a souvent refusé d'évaluer les données des sciences sociales. Étant donné  
la possibilité pour les procureurs tant de la Couronne que de la défense de  
faire appel aux témoignages d'experts pour venir en aide au tribunal, cette  
répugnance semble superflue.

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61 R. c. Prairie Schooner News Ltd. and Powers (1970), 1 C.C.C. (2e) 251,  
75 W.W.R. 585.

62 Ibid, p. 258.

63 R. c. Pink Triangle Press (1980) 51 C.C.C. (2e) 485 (C.A. Ont.),  
renversant (1979), 45 C.C.C. (2e) (C. de comté Ont.).

R. c. Murphy<sup>58</sup>, un spectacle sur scène n'a pas été jugé obscène, le tribunal ayant été influencé par le fait que les représentations avaient été données uniquement devant des adultes qui avaient payé pour voir des femmes nues danser sur la scène, des adultes qui avaient été dûment informés par la publicité, sur la nature du "divertissement". Dans l'affaire R. c. Macmillan Company of Canada<sup>59</sup>, le tribunal a mentionné que l'emballage et le prix du livre Show me limitaient effectivement la clientèle aux lecteurs adultes et a déclaré qu'un enfant aurait besoin d'être guidé par un adulte pour comprendre le contenu du livre.

Dans tous ces exemples, les tribunaux montrent bien la nature relative de la conception légale de l'obscénité. Avec l'apparition de la sexualité dans le domaine public, il ne s'agit pas tant d'interdiction que de réglementation de l'accès par le moyen du processus criminel. Comme l'a dit David Price: "... une série de décisions judiciaires faisant jurisprudence ... s'est formée au cours des dernières années pour rendre valides les circonstances d'une représentation afin de distinguer entre ce que le public acceptera de voir pour lui-même et ce que le grand public dans son ensemble acceptera comme pouvant être vu par ceux de ses membres qui le désirent ainsi"<sup>60</sup>.

Le rôle de l'expert cité comme témoin dans la détermination de l'obscénité a aussi été établi par les décisions des tribunaux. La question qui consiste à savoir si du matériel supposément obscène dépasse la norme de tolérance nationale est une question à laquelle peut répondre un critère empirique. Le juge A. Dickson a aidé ici à établir les

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58 R. c. Murphy (1972) 8 C.C.C. (2<sup>e</sup>s) p. 313.  
59 R. c. Macmillan Company of Canada Ltd, (1976), 31 C.C.C. (2<sup>e</sup>s) p. 286.  
60 Price, David. 57 Revue du Barreau canadien, note (6) ci-dessus, p. 324.

du jury a trouvé que les aides sexuelles, dénommées "stimulateurs anaux", "cunnilingus automatisé" et "amant robot" se rangeaient dans la catégorie des publications et n'a donc pas jugé nécessaire de dire que le paragraphe 8 de l'article 159 définissait seul l'obscénité. Dans sa dissidence, le regretté juge en chef Laskin, a accepté la double argumentation de la défense, à savoir que les aides sexuelles n'étaient pas des publications et que le paragraphe 8 de l'article 159 était le seul critère d'obscénité au Canada. Le projet de loi C-19 donne maintenant à penser que l'intention du gouvernement est de faire de la définition de l'obscénité prévue par la loi la seule et unique définition de l'obscénité; le mot "publication" a été remplacé par les mots "matière ou chose". Il faudra dorénavant juger de l'obscénité des "matières" ou des "choses", une catégorie d'objets beaucoup plus étendue que celle des publications.

Ces difficultés constantes relativement aux rôles à accorder aux différentes définitions légales de l'obscénité sont toutefois peu apparentes en dehors du contexte de la légalité. À des fins de pratique courante, la définition statutaire de l'obscénité constitue la norme opératoire au sein des tribunaux canadiens.

Ce qui a le plus d'importance dans l'élaboration d'une politique sociale, c'est le rôle que les restrictions d'accès ont joué dans la détermination de l'obscénité. Dans l'affaire R. c. Harrison<sup>57</sup>, il s'agissait d'un film supposément obscène présenté à quelque vingt-cinq hommes invités à une fête dans une salle communautaire; il y avait une affiche avertissant qu'une fête privée était en cours. La District Court de l'Alberta a décidé qu'aux termes de l'alinéa a) du paragraphe 2 de l'article 159 du Code criminel, il n'y avait pas eu d'exposition à la "vue du public" et par conséquent pas de délit d'obscénité. Dans l'affaire

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57 R. c. Harrison, (1973), 12 C.C.C. (2es), p. 26 (1973) 4 W.W.R. 439 (Dist. Ct. Alb.)



s'imaginer pourquoi ces paroles ont causé tant d'émot dans le public"<sup>54</sup>. La définition de l'obscénité semble être plus intimement liée aux changements de la structure sociale qu'aux modifications législatives. Les tabous contre la sexualité montrée de façon explicite à l'écran n'ont pas été effacés par des lois; la jurisprudence apparaît, avec le temps comme l'instrument d'analyse le plus important, sûrement le plus utilisé et le plus utile dans l'élaboration d'une politique sociale.

La définition de l'obscénité que donne la loi fait vraiment encore aujourd'hui l'objet de débats. En 1977, dans l'affaire Dechow c. La Couronne<sup>55</sup>, la Cour suprême a eu à résoudre une autre fois le problème de l'application du critère Hicklin; il est toujours possible d'avancer que le critère Hicklin et le paragraphe 8 de l'article 159 fournissent vraiment des définitions complémentaires de l'obscénité et que les deux sont réellement utilisées par la magistrature<sup>56</sup>. Dans l'affaire Dechow, le tribunal a été invité à déterminer si un certain nombre d'aides sexuelles ou "stimulateurs" étaient des publications, au sens de l'article 159. Bien qu'il ait toujours été clair que, dans le cas de "publications", le paragraphe 8 de l'article 159 remplaçait le critère Hicklin, il est discutable de penser appliquer le critère Hicklin à du matériel obscène autre qu'une publication. L'avocat de l'accusé a soutenu que les aides sexuelles en question n'étaient pas des publications et que le critère Hicklin ne pouvait s'appliquer, le paragraphe 8 de l'article 159 définissant seul l'obscénité au Canada. Dans l'affaire Dechow la majorité

<sup>54</sup> Verdun-Jones, Simon. Droit criminel 230, Disc Course, Université Simon Fraser, 1984, Course Reader; p. 43.

<sup>55</sup> Dechow c. La Couronne (1977), 35 C.C.C. (2<sup>es</sup>) p. 22; 76 D.L.R. (3<sup>es</sup>) 1, S.C.C.

<sup>56</sup> À toutes fins pratiques, le paragraphe 8 de l'article 159 remplace le prononcé de 1868; le critère Hicklin n'a jamais vraiment été appliqué dans aucune des décisions rapportées depuis 1959.



Le débat public sur l'obscénité et la censure est néanmoins centré sur de publications a été axée sur les formes particulières de tort que toujours présente. En 1984, une recherche empirique portant sur un corpus de publications a été axée sur les formes particulières de tort que pouvaient causer les images prônant ou excusant la violence sexuelle<sup>53</sup>. En 1959, c'était une tout autre inquiétude, à savoir que les jeunes hommes "verraient leurs moeurs corrompues" en regardant des photographies de femmes nues. La question de nocivité est néanmoins restée au coeur des préoccupations du public.

Le matériel "obscène" lui-même est constamment redéfini par le biais de la jurisprudence, nonobstant les modifications législatives. Comme le remarque Simon Verdun-Jones "... Les pages censément obscènes dans L'Amant de Lady Chatterley semblent fades à l'extrême comparativement au genre de matériel sexuel très explicite que l'on retrouve dans les années 1980 ... Lorsque la pièce de George Bernard Shaw, Pygmalion, a été jouée pour la première fois en Angleterre au tournant du siècle, une clameur s'est élevée du public quand Eliza Doolittle a proféré ces mots: "tu te fous de ma gueule"; ... quand le film Autant en emporte le vent est apparu pour la première fois il y a quelque quarante ans, le public a grandement désapprouvé la célèbre réplique de Rhett Butler: "Franchement, ma chère, je m'en fiche pas mal". Il est difficile, dans le contexte d'aujourd'hui, de

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<sup>53</sup> Peut-être que l'analyse la plus complète de cette recherche est celle d'Edward C. Nelson intitulée "Pornography and Sexual Aggression", dans Yaffe M. et Nelson, E.C. The Influences of Pornography on Behaviour, London, Academic Press, 1982. Voir aussi: Malamuth, N. et Donnerstein, E. "The Effects of Aggressive - Pornographic Mass Media Stimuli", 15 Advances in Experimental Social Psychology, 103, Academic Press, 1982 et McCormack, T. "Machismo in Media Research: A Critical Review of Research on Violence and Pornography", 25 Social Problems, 1978, pp. 544 à 555. p. 312.

remarques du juge Freedman ont été confirmées par la Cour suprême en 1964, et dans les années subséquentes, les juges ont affiné davantage ce concept. Il semble désormais clair que c'est une norme collective nationale qui définit l'obscénité et non celle d'une collectivité universitaire, d'une ville ou d'une province<sup>50</sup>. Le procureur de la Couronne de l'Ontario, David Price fait de plus remarquer: "Au cours des dernières années, la norme pertinente de la Société canadienne a été définie comme étant la norme de tolérance et non la norme d'approbation. La phrase suivante "dépasse la norme de tolérance acceptée par la Société" a été lancée par le juge A. McAlliway lors de son prononcé dans l'affaire Rex contre Glibery et Reitman<sup>51</sup> et a été appliquée depuis dans de nombreux jugements"<sup>52</sup>.

Le critère Hicklin, dans son emploi des mots "dépraver" et "corrompre", nécessite une démonstration d'intention maligne; les normes de la société n'exigent pas de démonstration de malveillance - il suffit que la publication en question dépasse la norme de tolérance acceptée. Cela entraîne donc des conséquences très importantes pour la censure provinciale. Les censeurs qui ont à prendre les décisions se sentent responsables envers la population de la province; ils sont influencés par les discussions sur le tort que la pornographie peut causer, mais ils sont en fin de compte liés par une norme de tolérance collective, nonobstant la question de tort social.

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50 Voir Rex contre Glibery et Reitman (1971) 4 C.C.C. (2<sup>es</sup>) p. 187 (C.A. Ont., Rex contre Kiverago (1973), 11 C.C.C. (2<sup>es</sup>) p. 463, (C.A. Ont., et Rex contre MacMillan Company of Canada Ltd., (1976) 31 C.C.C. (2<sup>es</sup>), p. 322.

51 Voir note 50 ci-dessus.

52 David Price, Vol. 57 Revue du Barreau canadien, note 6 ci-dessus, p. 312.

Les tribunaux canadiens devaient examiner les buts sérieux de l'auteur ou du producteur, la valeur artistique du sujet en litige et les normes de la Société. Le juge Judson a cité, en l'approuvant, le juge Fullagar dans l'affaire Rex contre Close<sup>47</sup>: "Il y a toujours eu dans toutes les sociétés de tous les temps - bien que la norme puisse être différente d'une époque à l'autre - un sens général qui permette de distinguer ce qui est décent de ce qui est indécent, ce qui est propre de ce qui est sale, et lorsque la distinction reste à faire, je ne connais pas de meilleur tribunal qu'un jury pour la faire"<sup>48</sup>.

Cette analyse représente un écart bien marqué avec le critère Hicklin. Les membres les plus faibles de la société, ceux qui sont "vulnérables aux influences immorales" n'ont pas été au centre des préoccupations. Comme l'a fait remarquer avec intention le juge A. Freedman dans la cause Dominion News and Gits contre La Couronne: "... un grand nombre de lecteurs n'est ... pas toujours un facteur totalement à rejeter, il peut devoir être pris en considération quand on cherche à établir ou à définir les normes de la collectivité relatives à cette matière. Ces normes ne sont pas fixées par ceux qui ont de vils intérêts ou le pire des goûts. Elles ne sont pas non plus fixées exclusivement par ceux qui ont une tournure d'esprit et une conception puritaines, rigides, austères et réactionnaires. On doit trouver quelque chose qui se rapproche du sens commun et des sentiments partagés par la moyenne des gens"<sup>49</sup>. Les

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47 Rex contre Close, (1948), V.L.R., p. 445.

48 Brodie, Dansky et Rubin contre La Couronne, note 45 ci-dessus, 132, C.C.C. p. 182.

49 Dominion News and Gits contre La Couronne, (1967) 3 C.C.C. 1 et 2 C.C.C. 103 (1969) (C.A. Manitoba).

la Cour suprême du Canada n'a pas tant exclu le critère Hicklin qu'il l'a déplacé en tant que norme en vigueur.

Il est important de noter que la liberté d'expression faisait l'objet de préoccupations au temps du projet de loi C-58. En le citant l'opposition approuvait les mots de Frank Underhill de l'Université de Toronto: "Ce que j'essaie de faire remarquer, c'est que les artistes littéraires modernes, en se concentrant sur le sexe, la violence et les sociétés décadentes, n'exploitent pas seulement ces thèmes pour l'amour de la vulgaire célébrité et des profits à tirer des best-seller. Ils essaient, sérieusement et profondément, de dire quelque chose d'important sur la condition humaine de notre temps ... S'ils regardent le côté sombre et présentent des images pénibles ou repoussantes des êtres humains en action, peut-être les blâmer celui qui a été touché par l'expérience de notre époque"<sup>46</sup>.

Alors qu'il est difficile d'affirmer que de nombreuses publications pornographiques essaient aujourd'hui "sérieusement et profondément, de dire quelque chose d'important", il est juste de noter qu'en 1959 autant qu'en 1984, nous pouvons voir des reflets de l'ordre social, la réalité des relations sexuelles de 1984 est que nous avons à la fois "des images pénibles ou repoussantes des êtres humains en action"; la pornographie demeure un reflet et un reportage de l'époque dans laquelle nous vivons.

La Loi que fit adopter Monsieur Fulton en 1959, a cependant opéré des changements importants dans la structure de la surveillance légale en matière d'obscénité. La magistrature a rapidement élaboré la nouvelle norme. Dans la cause Brodie, Dansky et Rubin, la Cour suprême a statué que



En juillet 1959, Monsieur Fulton s'adressait à la Chambre des communes et déclarait au sujet du projet de loi C-58: "Nous croyons que nous avons créé une définition qu'il sera possible d'appliquer ... en complètement du critère subjectif assez vague ... Les critères seront: est-ce que la publication qui fait l'objet de plaintes parle de sexe, ou de sexe et d'un ou plus d'un des autres sujets mentionnés? Si oui, s'agit-il d'une caractéristique dominante? Encore, si tel est le cas, ces sujets sont-ils exploités d'une manière indue?"<sup>43</sup>.

Monsieur Fulton ne proposait pas de remplacer le critère Hicklin; la surveillance en matière d'obscénité étendait simplement ses limites. C'était l'intention du Ministre de donner plus d'ampleur à la définition. Il disait à cet effet: "Nous avons délibérément voulu couper court à toute tentative de condamnation de publications qui présenteraient, à la démonstration, une véritable valeur littéraire, artistique ou scientifique. Il reste que ces ouvrages doivent être traités conformément à la définition Hicklin, qui n'est pas remplacée par la nouvelle définition de la loi"<sup>44</sup>.

L'analyse de Monsieur Fulton n'était pas celle de la Cour suprême du Canada. Dans sa première interprétation de l'obscénité après la modification adoptée en 1959, la Cour a déclaré que l''Amanat de Lady Chatterley de D.H. Lawrence était une "oeuvre littéraire" en utilisant la nouvelle définition spécifique de l'obscénité donnée par le paragraphe 8 de l'article 159. Dans la cause Brodie, Dansky et Rubin contre La Couronne<sup>45</sup>,

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43 Canada, Débats de la Chambre des Communes, 6 juillet 1959, t.1., 5517.

44 Ibid, 5517.

45 Brodie, Dansky et Rubin contre La Couronne, (1967), S.C.R., p. 681, 132 C.C.C., p. 161, 32 R.L.R. (2d) p. 507, 37 c. r. 120.



Fait intéressant, la Commission spéciale a trouvé le critère Hicklin "explicite" et "applicable": "Aucune cause portée à l'attention du ministère de la Justice n'a échoué pour la poursuite en raison de quelque imprécision de la loi. La loi est tout à fait explicite"<sup>40</sup>. La Commission a, cependant, admis qu'il y avait des plaintes en faisant la constatation conciliante suivante: "Le ministère de la Justice ajoute en plus que s'il est démontré, après expérience de l'application de la loi, que ladite loi n'est pas applicable, le gouvernement du Canada consentira à consulter à nouveau les autorités provinciales à cet effet et à réviser la loi existante"<sup>41</sup>.

Le ministre de la Justice a réaffirmé son soutien au critère Hicklin de 1953 à 1957. Mais, après l'élection d'un gouvernement conservateur, l'opposant le plus farouche au critère, B. Davie Fulton, fut promu ministre de la Justice. Rappelons que Monsieur Fulton avait dit à la Commission spéciale en 1952 que le critère Hicklin était purement subjectif et qu'une loi "plus facile d'application" était nécessaire. Dans un article de la Revue du Barreau canadien de 1966, W.H. Charles fait remarquer ceci: "Le genre de publications offensantes que Monsieur Fulton avait à l'esprit comprenait aussi bien des magazines à sensation et de poche que les magazines représentant des femmes nues ou à moitié nues. Ces magazines étaient, de l'avis de Monsieur Fulton, dangereux parce que les jeunes tenteraient d'imiter les actions décrites dans les magazines et veraient ainsi leurs moeurs corrompues"<sup>42</sup>.

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40 Ibid, p. 246.

41 Ibid, p. 246.

42 W.H. Charles, note 9 ci-dessus, p. 251.

jeunes pour des fêtes d'adolescents, qui sont, c'est le moins que l'on puisse dire, franchement suggestifs et faits intentionnellement pour assister aux "sessions de becotage" quand les lumières sont baissées. Et l'Association de continuer: "... Nous pouvons ajouter que nous ne sommes pas sans savoir que des films et des disques malpropres sont fournis à des auditoires d'adultes, mais nous préférons ne pas en parler ici"<sup>37</sup>.

Malgré la distance qui nous sépare de cette rhétorique, il y a des critiques qui sont persistantes. La Commission spéciale a été informée du mépris de la pornographie pour les aspects spirituels des relations humaines, ce que nous pouvons appeler aujourd'hui la "commodification" ou "l'objectification" de la sexualité<sup>38</sup>. Margaret O'Brien, présidente du Comité provincial de la bonne littérature, émet cette autre opinion: "Les publications porno à sensation entrent les mains des très jeunes ne sont pas susceptibles de susciter des émotions et d'exciter les bas instincts ...

mais (elles) colorent leurs attitudes envers la société et ont ainsi tendance à ruiner la cellule familiale sur laquelle est fondée notre société"<sup>39</sup>. La cellule familiale a été, peut-être plus en douceur, soumise à des changements rapides de structure et de composition au cours des 32 dernières années. Ce qui demeure obscur, ce sont les rôles secondaires que joue la pornographie - pour se refléter et avoir des incidences sur l'ordre social.

37 Ibid, p. 38.

38 Pour une discussion intéressante, quoique problématique, au sujet de la commodification et de l'objectification, voir Germaine Greer, *Sex and Destiny*, Londres, Secker and Warburg Limited, 1984.

39 Voir note 30 ci-dessus, p. 201.

suggérer l'obscénité ... L'intention était de créer un décor artistique et non pas une scène immorale"<sup>34</sup>.

L'objection principale dans la cause Conway contre La Couronne constitue un bon exemple de l'évolution du public dans sa conception de la sexualité et de la nudité; les images très réelles du cinéma, de la scène et de la photographie imprimée ont été le reflet d'un ordre social nouveau et ont servi à leur tour à structurer la pensée. La Commission sénatoriale de 1952 a été formée pour essayer de discuter des tensions qui s'étaient manifestées.

Les délibérations de la Commission spéciale montrent que la sexualité florissante de la jeunesse canadienne, et en fait des adultes, était au centre de toutes les préoccupations. Les conclusions du rapport de la Commission au Parlement se lisent comme suit: "... ceux qui impriment, importent, distribuent ou exhibent pour les vendre des publications licencieuses et indécentes sentiront la force de l'opinion publique et seront amenés à prendre conscience qu'ils font quelque chose de sale, d'immoral et de mauvais au détriment du Canada dans sa situation actuelle ... toute chose qui ruine la moralité de nos citoyens et particulièrement de nos jeunes, est une action franchement non canadienne"<sup>35</sup>.

La rhétorique est ici particulière à l'époque et les plaintes soumises à la Commission sont en ces termes: "positions calculées pour éveiller des émotions lascives" ou "illustrations très hautes en couleur de nus soi-disant provocateurs"<sup>36</sup>. L'Association catholique parents-maîtres d'Ottawa propose la prohibition des disques pour adolescents "vendus aux

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34 Ibid, p. 536.

35 Voir note 30 ci-dessus, p. 246.

36 Ibid, p. 38.

de la réaction du public à cette prédominance nouvelle de la sexualité, qu'a été formée la Commission sénatoriale chargée d'examiner les publications licencieuses et indécentes<sup>30</sup>. La jurisprudence de cette période révèle à la fois une plus grande tolérance du public envers l'affichage de la sexualité et à la fois les inquiétudes grandissantes du public face à ce débordement.

La décision du juge Iazure dans l'affaire Conway contre La Couronne est particulièrement représentative de ce débat<sup>31</sup>. La Cour a dû statuer sur la légalité d'une représentation théâtrale supposément obscène, donnée au Théâtre Gaieté de Montréal. Six jeunes femmes apparaissaient nues des épaules à la taille et restaient immobiles pendant la représentation de Spin a Web of Dreams. Bien que les témoignages apportés à la Cour aient établi que les femmes portaient "... des soutiens-gorge ou des bustiers fabriqués dans un tissu très léger"<sup>32</sup>, le juge du tribunal de première instance ne les a pas trouvées suffisantes. Le juge Cloutier de la Cour des sessions de la paix a conclu que "... d'après l'ensemble des témoignages, il pouvait être déclaré que la représentation en question montrait audacieusement des personnes du beau sexe si peu vêtues que c'était immoral, indécent et obscène"<sup>33</sup>. Le juge Iazure a accordé le pouvoir en appel contre le jugement, en faisant les remarques suivantes: "Étant donné que les actrices ne pouvaient ni bouger ni parler, mais cherchaient à représenter des statues, il semble assez évident que le but n'était pas de

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30 Le Sénat du Canada, Proceedings of the Special Committee on Sale and Distribution of Salacious and Indecent Literature, Ottawa, Imprimeur de la Reine, 1952.

31 Conway contre La Couronne (1944) 2 J.L.R., p. 530.

32 Ibid, p. 533.

33 Ibid, p. 535.



échanges de coups de feu, des vols, de la violence et des scènes horribles sans bons côtés pour le racheter"<sup>28</sup>; en Nouvelle-Écosse, "Qui a peur de Virginia Woolf?" a été interdit pour "obscénité" et "blasphèmes", "mots grossiers" et "allusions familiales à la copulation"<sup>29</sup>.

L'époque de la censure restrictive dans les deux provinces a été finalement accompagnée de critiques de plus en plus nombreuses et a cédé la place à une époque plus libérale. En Colombie-Britannique, l'accession en 1954 de Ray Macdonald à la fonction de directeur de la Film Classification Branch, a marqué ce changement de style; en Nouvelle-Écosse, le secrétaire de la province, Gerald Doucet, a demandé en 1966 un examen de la censure du cinéma, lequel examen a marqué la fin d'une période de restriction.

Néanmoins, l'histoire des débuts de la censure du cinéma pour les provinces de l'Ontario, du Québec, de la Nouvelle-Écosse et de la Colombie-Britannique s'explique mieux par la discontinuité que par la continuité. L'Ontario a travaillé dans le cadre fixé par la rhétorique et le style du libéralisme tandis que le Québec, la Nouvelle-Écosse et la Colombie-Britannique ont emprunté des routes de surveillance plus étroite. Fait plus important encore, le flux et le reflux de modèles de censure opposés révélaient bien peu de cohérence au cours des ans dans les quatre provinces, ce qui prouve que la valeur de l'autonomie en matière de restriction préalable est discutable.

Quant à l'autorité fédérale en matière d'obscénité, notre examen du passé révèle le même flux et reflux, du moins en ce qui concerne la cible qui est propre au droit criminel. L'époque qui chevauche la fin des années quarante et le début des années cinquante est celle où la sexualité est devenue plus apparente dans le public. C'est en effet en 1953, à la suite

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28 Censored Only in Canada, note 16 ci-dessus, p. 118.

29 Ibid, p. 134.



L'époque des pratiques restrictives de la censure du cinéma a pris fin au Québec avec la nomination d'André Gauthier à la présidence du Bureau de censure en 1962; Gauthier, Pierre Saucier, Jean Tellier et d'autres ont formé depuis une règle du cinéma, souvent acclamée par les critiques pour ses analyses en profondeur<sup>25</sup>. En effet les critiques dont les censeurs du Bureau de censure du Québec étaient la cible avaient poussé le gouvernement provincial à former, en 1961, un "Comité d'étude provisoire de la censure au cinéma". Les membres du Comité de la Régie ont été unanimes à dénoncer les pratiques du Québec jusqu'à la : "Il n'y a qu'une façon de décrire à la fois les méthodes de cette institution et l'esprit qui l'anime: c'est complètement archaïque et le Comité croit que c'est irrévocable"<sup>26</sup>. Tandis que les premières années d'activité de la censure en Ontario reflétaient le libéralisme de l'administration d'Omri J. Silverthorne, les premiers censeurs du Québec étaient apparemment plus stricts quant à l'esprit de leur rhétorique et à la substance de leurs actions.

La Colombie-Britannique et la Nouvelle-Écosse ont toutes deux voté des lois relatives à la censure du cinéma quelques années à peine après l'initiative Ontario-Québec-Manitoba<sup>27</sup>. Les premières années de censure dans les deux provinces ont été marquées par l'application restrictive des dispositions légales existantes. Les images de sexualité et de violence faisaient une autre fois l'objet de préoccupations, bien qu'à des moments différents dans les deux provinces. En Colombie-Britannique, le film *A Law Unto Himself* était interdit parce qu'il se réduisait à "rien que des

25 Voir "André Gauthier et son bureau unique au monde", *La Presse*, 10 janv. 1981, C1-C2 et Ted Blackman. "How to Censors Judge the Movies", *Montreal Gazette*, 19 janv. 1983.

26 Cité dans L'État démocratique et son attitude envers le cinéma et les publications, discours non publié fait devant les directeurs des services de police de la région du grand Québec, 1969, p. 4.

27 *Statutes of British Columbia*, 1913, "An Act to Regulate Theatres and Cinematographs"; *Statutes of Nova Scotia*, 1915, "An Act Respecting Theatres and Cinematographs", chap. 36.

droit jurisprudentiel, à l'exception de la "Loi du cadenas" votée au Québec en 1936. La modification, en 1959, aux dispositions fédérales en matière d'obscénité n'a pas semblé non plus avoir d'influence directe sur les façons adoptées par les provinces pour aborder la censure et la classification.

Au Québec, pendant les premières années, la censure reflétait non seulement une morale mais un programme social et politique. C'est au cours du règne de Maurice Duplessis que cet état de choses a existé avec le plus de vigueur, la Loi du cadenas de 1936 étant l'exemple même de l'esprit de ce temps. Finalement rejetée par la Cour suprême du Canada comme restriction excessive de la liberté d'expression, cette loi a néanmoins exercé une forte influence pendant plus de 20 ans. Son but explicite qui était de protéger la province contre la propagande communiste a inspiré les travaux des censeurs québécois; les films qui encourageaient le syndicalisme ont été la cible d'un rejet net<sup>23</sup>.

Mais au cours de la même période au Québec, la violence et la sexualité dépeintes de façon inopportune faisaient aussi l'objet d'inquiétudes. Malcolm Dean fait mention des normes du Bureau de censure du Québec dans les années trente: "Il était permis de faire allusion au divorce dans les dialogues de films, mais le divorce ne devait jamais être présenté de manière attrayante ... Dans les films de meurtres, l'utilisation des armes à feu devait être réduite à l'essentiel"<sup>24</sup>.

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23 Fait intéressant, des décisions récentes font penser qu'il y a encore des préoccupations juridiques au sujet des pouvoirs de prohibition sans entrave des provinces, voir Réf. Ontario Film and Video Appreciation Society, note (1) ci-dessus et Nova Scotia Board of Censors et al and McNeil (1978), 84 D.L.R. (3<sup>es</sup>) 1.

24 Censored Only in Canada, note (16) ci-dessus, p. 159.

Saturday Night and Sunday Morning montre assez bien que nous outrepassons notre pouvoir ... peut-être que le temps est venu de songer à l'abolition de la censure par ordonnance gouvernementale au Canada ... Telles qu'elle est pratiquée à l'heure actuelle au Canada, j'aimerais que la censure soit abolie au cours des deux prochaines années."<sup>21</sup>

Et pourtant Silverthorne et le Bureau de censure n'hésitaient pas à réclamer l'élimination de passages qui étaient des déclarations de sexualité enflammées. En 1967, le passage suivant du film *Ulysse* a été retranché: "J'ai souvent senti que je voulais l'embrasser tout partout, sa belle petite queue aussi, là tout simplement. Ça ne me ferait rien de la prendre dans ma bouche si personne ne me regardait, comme si elle me demandait de la sucer. Il avait l'air si pur et si gentil avec son visage d'enfant"<sup>22</sup>.

Après vingt ans de calme relatif, Silverthorne a connu un mandat plus mouvementé vers la fin des années soixante et au début des années soixante-dix alors que les réalités de la "révolution sexuelle"

commencèrent à se refléter dans un nombre sans cesse croissant de films. Le Bureau de censure de l'Ontario de même que les Bureaux du Québec, de la Nouvelle-Écosse et de la Colombie-Britannique ont eu à trouver des réponses devant l'élargissement des frontières de la tolérance quant au rôle de la sexualité dans le domaine public. Les tabous portant sur l'exhibition des poils pubiens et des organes génitaux ont été examinés à nouveau et écartés par la suite, encore qu'à des moments et dans des contextes différents pour chacune des quatre provinces. Contrairement aux procédures du droit criminel fédéral, l'autorité provinciale en matière de censure n'a pas été liée à des changements particuliers apportés au droit statutaire et au

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21 Ibid, p. 147.

22 Ibid, p. 145.

cent de tous les films soumis au cours des premières années. Mais la disposition législative n'était pas, et n'a jamais été, au coeur des décisions prises par le Bureau de censure. L'alinéa a) de l'article 2 de la loi actuelle (Theatres Act) de l'Ontario conserve un pouvoir accordé pour la première fois en 1911, à savoir: "censurer tout film et ... enlever en coupant ou autrement toute partie de film dont il n'approuve pas la représentation en Ontario"<sup>19</sup>.

Alors qu'il est plus facile de comprendre l'évolution de la loi sur l'obscénité par l'analyse de cas, l'évolution de la censure est mieux comprise en examinant la durée des bureaux de censure successifs. Le pouvoir de prohibition a toujours existé en ce qui concerne l'obscénité comme offense criminelle. Mais tandis que les décisions judiciaires ont été forcément fondées sur la jurisprudence existante, les censeurs ont établi successivement des modèles distincts et souvent discontinus en matière de censure et de classification. Cette situation ne doit cependant pas être considérée comme répugnante au point de vue philosophique et pratique; l'autonomie provinciale en matière de surveillance des représentations publiques ne doit pas, selon toutes attentes, nécessairement donner naissance à une cohérence chronologique.

En parlant d'Omeri J. Silverthorne du Bureau de censure de l'Ontario, Malcom Dean l'a qualifié de "modèle parfait du censeur moderne"<sup>20</sup>.

O.J. Silverthorne est devenu président du Bureau de censure de l'Ontario avant l'âge de trente ans; sa pensée a influencé, pendant près de 40 ans, la façon de prendre les décisions relatives à la censure. De 1936 à 1974, Silverthorne a survécu aux tempêtes de la censure et de ses critiques. En 1971, à la conférence des censeurs canadiens, il a déclaré: "... Je tolle qu'a soulevé en Ontario la censure de films comme Elmer Gantry et

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<sup>19</sup> Statuts révisés de l'Ontario, 1980, The Theatres Act, chap. 498, art. 2, alinéa a).

<sup>20</sup> Censored Only in Canada, note 16 ci-dessus, pp. 138-148.



la pornographie. Dans la littérature érotique, aucun des deux sexes n'est dégradé ni perçu comme cible possible de violence... Les publications de nature érotique ou sexuelle ne sont pas ce à quoi s'opposent les femmes; c'est à la pornographie que nous nous opposons, c'est-à-dire les matières imprimées ou écrites qui humilient, avilissent les femmes et font montre de violence contre elles"<sup>15</sup>.

L'excitation sexuelle n'a pas toujours été vue de manière aussi bienveillante par le grand public. Le 24 mars 1911, les provinces l'Ontario, du Québec et du Manitoba ont toutes adopté une loi autorisant et censurant à la fois la représentation publique de films. Au cours de leurs premières années d'activités, elles ont souvent été obligées de supprimer, dans des films, des commentaires sur les maladies vénériennes. Il y avait une certaine répugnance à reconnaître le côté peu recommandable des relations sexuelles des jeunes hommes canadiens à la guerre<sup>16</sup>. En 1919, l'Ontario Censor Board a défendu la représentation du film *The End of the Road* parrainé par le Y.W.C.A. et décrit comme "une des forces les plus grandes pour éveiller l'opinion publique à la nécessité de combattre les maladies vénériennes"<sup>17</sup>.

La loi initiale de l'Ontario, *The Theatres and Cinematographs Act*, avait plutôt tendance à être prohibitive dans ses premières années d'application<sup>18</sup>. En effet, le Bureau de censure n'approuvait que 25 pour

15 Toronto Area Caucus of Women and the Law, "Pornography: The Law and Women's Rights", manuscrit non publié, 1984, p. 45.

16 Un examen utile des premières années de censure du cinéma par les provinces se trouve dans le livre de Malcolm Dean *Censored Only in Canada*, Toronto, Virgo Press, 1981. Bien que ce livre souscrive simplement aux analyses libérales courantes, il exquise une histoire de grande valeur.

17 C'était la position du Canadian National Council for Combating Venereal Disease soulignée dans *Censored Only in Canada*, note 16 ci-dessus, p. 24.

18 Ibid, pp. 135-138.



Des modifications aux dispositions fédérales en matière d'obscénité ont été apportées en 1900, 1909, 1913 et 1949, avant la refonte de 1959. La loi modifiant le Code criminel de 1913 est particulièrement intéressante et fait la lumière sur la question. L'article 8 de la loi interdisait "... une annonce de quelques moyens, instructions, médecine, drogue ou article, pour rétablir la virilité sexuelle, ou guérir des maladies vénériennes ou des maladies des organes génitaux"<sup>13</sup>. De toute évidence, cela apparaît comme la répression patrilacale de la sexualité dysfonctionnelle. Il n'y a que la "virilité" mâle pour être la cible d'une loi. L'annonce d'un traitement approprié aux maladies vénériennes ou autres maladies de l'anatomie de reproduction ne semble pas être un objet convenable de sanction criminelle. Et pourtant, cette interdiction figure encore aujourd'hui à l'alinéa d) du paragraphe 2 de l'art. 159 du Code; il est difficile de croire que son maintien puisse encore avoir un sens.

En général, jusqu'en 1959, les modifications aux dispositions du Code criminel relativement à l'obscénité n'ont pas, porté sur la définition Hicklin. Ce n'est qu'en 1949 qu'a été spécialement traitée la question de la catégorisation plus précise de l'obscénité, débouchant sur la criminalisation des bandes dessinées exploitant le crime<sup>14</sup>. Le projet de loi présenté avait comme titre: "Images de magazines, etc. ayant tendance à induire à la violence" et était l'oeuvre de l'architecte de la refonte de 1959, E. Davie Fulton.

Il se dégage de ce texte d'alors un sentiment de déjà vu par rapport aux débats actuels autour du contenu négatif des images de violence. À l'heure actuelle, ce qui est fondamentalement différent, c'est l'attention donnée à la violence contre les femmes. L'excitation sexuelle, en soi, est acceptée et même bien accueillie. Comme le suggère le Toronto Area Caucus of Women and the Law "... les femmes ne s'opposent pas à l'érotisme mais à

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<sup>13</sup> Statuts du Canada, 1913, loi modifiant le Code criminel, chap. 13, art. 8.

<sup>14</sup> Statuts du Canada, 1913, loi modifiant le Code criminel, chap. 13, art. 1, paragraphe 3.

L'obscénité selon le test Hicklin ait fait l'objet de très nombreuses critiques juridiques des praticiens et des théoriciens, elle a tout de même eu presque 70 ans de vie politique au Canada<sup>9</sup>.

Dans leurs premières applications du critère Hicklin, les tribunaux canadiens se sont inquiétés de l'immoralité pouvant découler des possibilités d'excitation sexuelle. En 1905, dans l'affaire Rex contre Beaver<sup>10</sup>, la Cour d'appel de l'Ontario a déclaré au sujet d'un imprimé: "Il n'y a aucun doute que le langage qui fait l'objet des plaintes est si ordurier et dégoûtant que la plupart des personnes le trouveraient répugnant à lire et est si grossier qu'elles ne courraient aucun risque de voir leur morale corrompue. Mais malheureusement, il y en a d'autres prédisposées aux pensées libidineuses sur qui il aurait précisément l'effet opposé"<sup>11</sup>.

Lors d'autres causes rapportées au début du vingtième siècle, les tribunaux canadiens ont également souscrit à l'application du critère de Hicklin. Après l'examen en profondeur qu'il a fait des jugements d'obscénité de 1900 à 1940, W.H. Charles a dit: "Il semble juste de conclure que le critère Hicklin a été appliqué dans toute sa rigueur. Certaines publications ont été condamnées à cause de passages isolés qui, d'après jugement, pouvaient avoir une tendance à corrompre et à dépraver une minorité de personnes sensibles, bien que la plupart des personnes aient été plutôt dégoûtées que corrompues par les publications en question. Dans aucune cause, l'intention ou les motifs de l'auteur n'ont été pris en considération"<sup>12</sup>.

9 Voir Charles, W.H. "Obscene Literature and the Legal Process in Canada", Vol. 44 Revue du Barreau canadien, p. 243 (1966). Pour une première manifestation de mécontentement par rapport au critère Hicklin, voir Rex contre Strohl, (1951) 100 C.C.C.; p. 171, (Montréal, Cour des sessions).

10 Rex contre Beaver, (1904) 9 C.C.C.; p. 415 (C.A. de l'Ontario).

11 Ibid., pp. 422-423.

12 Voir note (9) ci-dessus, Vol. 44 Revue du Barreau canadien, p. 246.

Jusqu'en 1959, les tribunaux canadiens se sont fiés au test Hicklin<sup>5</sup> de Grande-Bretagne pour l'énonciation juridique de la notion d'obscénité. Alors que les provinces se sont toujours limitées au contrôle préalable des films à diffusion publique<sup>6</sup>, le champ des préoccupations du fédéral n'a pas été aussi restreint. Dans ce contexte, la décision récente de l'Ontario d'exercer un contrôle sur la représentation de bandes magnétoscopiques dans les maisons privées est digne de mention et de discussion. La mise au point d'une nouvelle technique de diffusion et de consommation de masse peut aider à restructurer la perception des responsabilités fédérales et provinciales en matière de surveillance du matériel offensant. Au moment où les moyens de diffusion se multiplient et se resserrent, le dialogue fédéral-provincial relativement au rôle de la censure face à l'obscénité devient de plus en plus important.<sup>7</sup> Il semble alors utile, pour être aujourd'hui bien informé, de replacer ce dialogue dans un contexte historique.

L'excitation sexuelle inopportune a toujours été en cause dans les délits d'obscénité criminels, sans parler des bandes dessinées exploitant le crime et des portraits de héros violents. Le juge en chef Cockburn a été le premier à écrire en 1868 dans l'affaire Rex contre Hicklin "... le critère d'obscénité se définit ainsi, si la tendance du fait incriminé comme obscénité est de dépraver et de corrompre ceux dont l'esprit est sensible à des influences immorales semblables et dans les mains desquels une publication de cette sorte peut tomber"<sup>8</sup>. Bien que la conception de

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5 Rex contre Hicklin, (1868) Vol. 3 Q.B.D. p. 360.

6 David Price a fait des commentaires perspicaces sur la notion de représentation publique de films dans "The Role of Choice in a Definition of Obscenity", Vol. 57 Revue du Barreau canadien, ch. p. 301, à la p. 318.

7 Voir plus loin: Obscénité et censure: une question de perception.

8 Voir note 5, ci-dessus, p. 371.

Il semble difficile, mais non pas étonnant, d'entamer la discussion sur le sujet de la censure. Bien que la pratique provinciale de la restriction préalable puisse supprimer le matériel offensant plus efficacement que la procédure criminelle fédérale, la peur de porter atteinte injustement à la liberté d'expression se retrouve des deux côtés.<sup>1</sup>

Et pourtant, les images promues par la "pornographie" sont, pour la plupart, comme le rapportent les auteurs du Rapport Williams de Grande-Bretagne, "répugnantes, superficielles et explicites".<sup>2</sup> La tâche à laquelle est confronté celui qui étudie le contrôle légal consiste à la fois à séparer et à rattacher fantasmes et réalités.

Le gouvernement fédéral s'est intéressé depuis 1892 à l'élaboration de définitions de l'obscénité,<sup>3</sup> pour leur part, les provinces, pour leur part, sont engagées dans la censure préalable des films depuis 1911.<sup>4</sup> Cet héritage de positions prises au fil des ans se révèle instructif et montre les changements fondamentaux dans la nature des préoccupations du public. Les moyens d'information se sont multipliés, sont plus puissants et de plus grande portée. La production des images sexuellement explicites en 1984 représente les relations humaines d'une façon qui n'aurait pu être imaginée en 1892 ou en 1911 au Canada.

<sup>1</sup> Pour un débat juridique plus récent sur cette question posée dans le cadre fédéral, voir *Rex contre Red Hot Video*, Vol. 6 V.V.V. (3<sup>e</sup>S) p. 331. Pour un examen des pouvoirs de censure provinciaux, voir Réf. Ontario Film and Video Appreciation Society et Ontario Board of Censors (1983) 147 D.L.R. (3<sup>e</sup>S), p. 58, 141 Ontario Reports (Zd), p. 583.

<sup>2</sup> Williams, Bernard, président, *Report of the Committee on Obscenity and Film Censorship*, Londres, Home Office, 1979, p. 96.

<sup>3</sup> Statuts du Canada, 1892, chap. 29.

<sup>4</sup> Statuts de l'Ontario, 1911, *The Theatres and Cinematograph Act*, chap. 73.

**ANALYSES  
DONNÉES ET**



recommandations relatives aux mesures à prendre, lesquelles mesures sont à la fois de compétence fédérale et de compétence provinciale.

Le but de notre étude était de revoir le statut juridique et le processus de prise de décisions du bureau de censure de quatre provinces, à savoir l'Ontario, le Québec, la Colombie-Britannique et la Nouvelle-Écosse. Cette étude impliquait l'examen obligatoire des rapports actuels entre la compétence provinciale en matière de censure et de classification et la compétence fédérale relative aux dispositions du Code criminel en matière d'obscénité. Dans la première partie de notre rapport, nous avons voulu présenter ce qui, au cours des ans, a servi de toile de fond à l'obscénité et à la censure; la législation et la jurisprudence, les analyses théoriques, les débats de la Chambre des Communes et les procès-verbaux des comités ont tous été utilisés pour dépeindre notre passé.

Dans la deuxième partie du rapport, nous apportons des exemples précis de décisions prises par les bureaux de censure des quatre provinces à l'étude. Nous avons concentré nos efforts sur les décisions qui sont des plus importantes pour le domaine juridique, c'est-à-dire celles qui comportent des interdictions de représentation publique. Les politiques des bureaux ont été éclaircies à la suite de l'analyse de cas, de l'étude des recueils de jurisprudence annuels, de considérations inhérentes aux dispositions légales et réglementaires et des réunions avec les membres des Bureaux de la censure de Vancouver, Toronto, Montréal et Halifax.

Dans la troisième partie de notre rapport, nous portons notre attention se porte sur les relations actuelles entre la juridiction fédérale et la compétence provinciale en matière de censure. Les données des tribunaux et de la police fournissent quelques indications sur les pratiques courantes dans la sphère fédérale; la jurisprudence révèle le chevauchement des pouvoirs provinciaux et fédéraux. En dernier lieu, nous soulignons la question de savoir quelles cibles se prêtent à la censure et lesquelles exigent une criminalisation; les recherches empiriques récentes portant sur la pornographie agressive font l'objet d'examens et d'analyses en profondeur. Notre rapport prend fin avec sept recommandations relatives aux mesures à prendre, lesquelles mesures sont à la fois de compétence fédérale et de compétence provinciale.



BUT DE L'ÉTUDE  
ET MÉTHODE





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SEXUALITÉ ET VIOLENCE, FANTASMES  
ET RÉALITÉS:  
CENSURE ET JURIDICTION CRIMINELLE  
EN MATIÈRE D'OBSCÉNITÉ

NEIL BOYD, LL.M.

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du Canada

Neil Boyd  
Professeur adjoint  
Département de criminologie  
Université Simon Fraser  
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# WORKING PAPERS ON PORNOGRAPHY AND PROSTITUTION

## Report # 17

### A SURVEY OF CANADIAN DISTRIBUTORS OF PORNOGRAPHIC MATERIAL

by  
B. Kaite

POLICY, PROGRAMS  
AND RESEARCH BRANCH  
RESEARCH AND  
STATISTICS SECTION



DISTRIBUTORS AND THE DISTRIBUTION OF  
ADULT AND PORNOGRAPHIC VIDEO  
AND MAGAZINES IN QUEBEC AND ONTARIO

Berkeley Kaite

Department of Sociology and  
Anthropology

Carleton University, Ottawa

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## INTRODUCTION

The following contains a profile of Canadian distributors and distribution practices of adult (i.e. what we would commonly refer to as pornographic) video and magazine companies. The report proceeds with a methodology section outlining the contours of the study. It is then divided into two broad segments, the parameters of which are defined by the two media (video and print) under study. The two media were chosen for their persistency and popularity as forms of adult expression (the video field currently expanding at an impressive rate) and their being the focus of much critical attention from various sectors in society.<sup>1</sup>

The profile, obtained from structured interviews with the distributors themselves, includes a description of what is generally available to the public; an overview of popular, saleable imagery in contemporary adult videos and magazines; and, distributors' perceptions of the typical consumer. There follows a discussion of the legal aspects of the distribution of adult video and magazines, the impact of the obscenity law on distribution activities, and the role of customs and respective censor boards in the adult entertainment industry.

Each section contains an account of the distributors' perceptions of contemporary Canadian community standards and of their opinions regarding the changes they would like to see effected

in the current obscenity law, as it influences their work.

By way of conclusion, the need for clarity and consistency in the obscenity law is underlined, and some discursive comments are offered on the problem of sexual representation and desire, not restricted to genre.



## METHODOLOGY

The original mandate of the study was to design a survey guide and contact Canadian producers and distributors of pornographic material, whose companies were located in Ontario or Québec, with a view to assess their marketing strategies; their perceptions of existing laws on obscenity and the impacts of legal decisions on their activities; their perceptions of their customers; and changes they would like to see in the law as it affects their work.

It soon appeared, however, that despite many efforts, no producers could be contacted. If any, there is a very limited production of "legitimate" adult material in Canada.<sup>1</sup> Some distributors own publication rights to some films; beyond that, if there is Canadian produced material it is underground. Hence, the decisions regarding what is available to the Canadian public are made at the point of distribution. Changes in the legal status of obscenity, particularly in the Canadian Criminal Code, will thus affect the distribution of adult videos and magazines.

For the purposes of this report, 20 formal interviews were conducted, eighteen with video and magazine distributors and one each with the chairperson of the Ontario Advisory Committee (retained by magazine wholesalers to advise on contemporary Canadian community standards) and the President of the Video

Retailers Association (legal counsel). In Québec one magazine and seven video distributors were interviewed. Three distributors of magazines and seven of videos were interviewed in Ontario. Discussions were also held with the head of the Morality Squad of the Montreal Urban Community and two members of Project "P" in Toronto. (Project "P" is a joint effort of the Metro Toronto and OPP units which deals with the education of police officers on the obscenity law and the confiscation of obscene material.) As well telephone interviews were conducted with some distributors who could not be met, individuals who have been or are currently involved in work in the areas of adult entertainment/pornography/censorship, customs officials, members of the Montréal Urban Community, the Sûreté du Québec, representatives from the Ontario Censor Board and a member of the Canadian Film Development Corporation.

The interviewees were chosen from the provinces of Québec and Ontario as these possibly represent the two extremes of the Canadian situation. Québec and British Columbia are reputed to have lax interpretations of obscenity while Ontario is known to be more conservative. Respondents were located through word of mouth and referral and the sample emerged on a "snowball" fashion. Furthermore, the study focussed on Toronto and Montréal (and surrounding areas). In the case of both media, names of competitors came up either during an initial phone conversation with a respondent or during the interview. It may thus be said that

the sample is likely to be representative of the major distributors in the field.

Finding adult video distributors was not difficult because of their success, visibility and (often) their association with feature film distribution (although two of the sixteen contacted would not return repeated phone messages). Six of the fourteen video distributors interviewed (3 from Ontario and 3 from Québec) deal solely with adult material, one also with a mail order business. The rest distribute feature films as well. Two respondents are involved with the handling of 35mm films (those which are seen in movie houses).

The distributors of adult magazines tended to be more elusive. This may be due to their having for a long while been the objects of control, hence their tendency to keep a low profile. A member of the Sûreté de Québec mentioned that home video has been "ignored" by the provincial police due to lack of censorship regulations. Thus they concentrate on the distribution of obscene magazines. This person could not provide the names of any video distributors; but nor could (would) he supply the names of those involved with publications (e.g. magazines) of a sexually explicit nature. Similarly, magazine distributors who were interviewed claimed no knowledge of the origin (in Canada) of sexually explicit magazines which contain close-up shots of sexual intercourse. Three magazine distributors contacted were going to be out of town. Four others would not participate in

an interview (either by not returning phone calls or by claiming they had "nothing new to say"). Of the four respondents finally interviewed, two (1 in Québec and 1 in Ontario) rely on adult material to bring in most of their business. The other two distribute other titles as well.

The interview schedule was designed around the following question areas: (1) the product: genre, country of origin; (2) the business: number of retailers under their auspices, average monthly sales; (3) the demand/desire for the product and the consumer; (4) the law: familiarity with the obscenity and customs laws and the way they work in practice; (5) their definitions of pornography; (6) desired changes in the law and community standards. Each interview lasted on average between 2 and 3 hours. They were open-ended: many respondents spoke at great length on topics which, although related, were not originally included in the survey. Notes were taken and interviews written up in prose immediately after their occurrence.

As preparation for the interviews which have informed this research, it was necessary to view videos (both Québec and Ontario versions) and peruse adult magazines, those available in Ontario "corner stores" or "adult" bookstores, and in "sex" shops in Québec. The author was also acquainted with legal literature on the obscenity law and various court cases.



VIDEO DISTRIBUTION: PORNOGRAPHY VS. ADULT ENTERTAINMENT

One of the problems with the discussions surrounding the topic of pornography centers on sifting through various levels of debate and arriving at an accessible definition of the phenomenon and its discourse. This is not easy as disparate factions and theoretical perspectives identify the issues differently, depending on what is felt to be at stake. Conservatives are concerned with the decline in morality, with emergent forms of polysexuality, and with the disintegration of the nuclear family. The decline in social values is seen in light of representations of "unhealthy" sexuality: sexual activity which takes place outside of a traditional relationship and which is non-functional (i.e. non-reproductive).<sup>1</sup> The liberal/libertarian position sees society as pluralist, "containing many points of view in uneasy co-existence."<sup>2</sup> Freedom of expression shall supersede any moral concerns.

Pornography, however objectionable it might appear, should therefore be available for individuals unless it can be proved that its presence within society affronts other individuals going about their daily business, or indeed produces forms of antisocial behaviour such as aggression upon particular individuals.<sup>3</sup>

The feminist intervention mobilizes around campaigns and demonstrations, identifies the main social antagonism as that between the sexes, and argues for "change in public attitudes by a redefinition of what constitutes an offensive representation."<sup>4</sup>



Recently, feminists have been anxious to nullify claims of prudery by isolating what they consider to be the most nefarious of genres: representations which combine sexuality with some forms of violence or with children. This is seen as inherently harmful and predicated on gender relations of dominance:

Pornography is a presentation, whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behaviour in which one or more participants are coerced overtly or implicitly, into participation; or are injured or abused physically or psychologically; or in which an imbalance of power is obvious, or implied by virtue of the immature age of any participant or by contextual aspects of the presentation, and in which such behaviour can be taken to be advocated or endorsed.<sup>5</sup>

On another level, a parallel feminist-informed intervention opposes these "feminist" visions which deny the acceptability of certain forms of sexual expression.<sup>6</sup> It also questions the variable status of different modes of representations in a cultural language with meaningful codes to be deciphered and attempts to analyse their association with the basic social and economic conditions (e.g. photography).<sup>7</sup> Discussion is also given to the possibilities of developing a women's erotica.<sup>8</sup>

As can be seen from this short overview, pornography is an issue charged with emotion and strange political alliances and an elusive definition. It does have certain identifiable features: it deals with sexual taboos and dominant images, inscribed into everyday practice and it portrays characters who possess only one dimension,

a sexual/genital one.<sup>9</sup> As a social "institution", however, it is defined differently according to the conceptions political groups have and their subsequent struggles.<sup>10</sup>

The distributors interviewed in this study deal with video and graphic representations of a sexual nature, and their own struggle is to "legitimize" their business and make sense of their "worlds" in the least dissonant way. The dissonance for them is personal, as is the notion of legitimation. They have moral concerns but also a business acumen which presupposes the necessity of making a profit, regardless of personal taste. Many mentioned that they did not enter this business to break the law: they worried about their reputations within the community and with their families, especially after a raid (their parents and in-laws read the papers, for example, and their kids talked amongst themselves). But these distributors also recognized that the level of discourse surrounding the "racy" material was a boost for the industry; thus retaining the "illegitimate" tag was often considered in business terms.

Distributors distinguish between "pornography" and "adult entertainment" (some magazine distributors refer to products of a sexually explicit nature as "men's sophisticate titles") not only as a descriptive tool, i.e. to identify qualitative differences in imagery contained in feature films and home video movies, but also to reinforce a moral dichotomy already in existence in popular opinion, in many other sectors in society and that is

accessible to many. No video distributor considers his products to be pornographic. Products are variously labelled "adult movies", "sex movies" or "erotica films". Within this context their work is justified on the basis that films/videos are produced by responsible "adults" for the consumption of similarly responsible "adults". There is a presumed need for adult movies which distributors feel they are satisfying (the nature of the need will be discussed further on).

When asked if they considered their work to be pornographic, video/film distributors consistently responded in the negative. However, they consistently used the word "pornography" as a descriptive label and may implicitly consider their work as such. For example, common phrases were: "when I got into the pornography business..."; "there will always be a demand for pornography...". The label is one which, historically and in common sense terms, refers to representations of a sexual orientation and thus has currency among the public, of which the distributors are a part. Hence, the appeal and accessibility of the term. However, attempts are made at refining the use of the word pornography (which curiously resemble the more vocal feminist position/definition).<sup>11</sup> Aware of debates surrounding sex in the public sphere, at least at the level of media creation, and the contentiousness of the issues, distributors use the term "pornography" explicitly to refer to a variety of things, usually undesirable and deemed offensive. This allows for location within the moral debate without implication. Allowing for the difficulties with trying to define an elusive term

yet one laden with social and moral meaning, some identify pornography, conceptually, as a "personal thing":

"Nobody, by today's standards, can define it." (Q.a.)<sup>12</sup>

"Define degrading. What is it?" (O.a.)

"Explicit sex is good taste... it's according to one's own definition." (A.a/f.)

Taking this to its extreme one respondent defined as pornographic "anything that will shock me". At the descriptive level, most Ontario distributors, operating with tighter interpretations of obscenity than in Québec (by the censor boards and local police) deem pornography to be what they do not deal in, i.e. an explicit focus on genitalia, graphic depictions of sexual activity; penetration, masturbation, ejaculation; anal or oral sex; or in other words explicit representations with nothing left to the imagination. One Ontario distributor defined pornography as bestiality, "kiddie-porn" (using children as models or models depicting children) and mutilation.

"Pornography would be graphic depictions of sexual activity and animals, kids, violence - it's not normal" (O.a/f.)

"...whatever is unacceptable to the agency regulating it... degradation of the human body - usually women - but it's a personal thing." (O.a/f.)

"... penetration, oral or anal sex, a focus on genitalia." (O.a/f.)

In Québec, however, explicitness is the norm. Thus, pornographic representations are considered to be those involving the "undue



debasement of women"; violence towards women or depictions of sado-masochism; kiddie-porn; bestiality and things another distributor considered to be "disgusting" - his examples were whipping and defecation.

Throughout, therefore, the terms "adult entertainment" or "adult magazines/videos" shall be used when referring to what is generally available.

### The business

Most video distributors own businesses that are between 1-6 years old. The majority are approximately three years old, the oldest is seven and one Ontario respondent began distributing feature films to cinemas 14 years ago. Although it appears that no adult videos are actually made in Canada, some distributors (seven in the sample) speak of "producing" videos. This refers to copyright ownership of certain films and their subsequent duplication. Only in that sense are commercially available videos produced here. Most adult videos were originally produced for theatrical distribution (35mm) and originate from New York and California - most respondents were reluctant to reveal the names of their American distributors.

Distribution companies which deal solely with adult video make, on average, approximately \$180,000 per month in sales. Without



their adult titles the businesses would likely fold. Distributors whose adult inventory is only a part of their overall stock (which includes feature films) have estimated monthly sales, from adult videos, which can range from \$1,000 per month to \$70,000 per month, representing from 1% to 25% of their total line (i.e. titles). Some respondents mentioned that they had to carry adult titles as part of their general line otherwise they'd have no business: their American distributors said "take all" (i.e. with adult) or nothing.

#### What is available

Within the popular lexicon there is a further distinction between "soft" and "hard core" pornography. "Soft" is taken to mean an Ontario version, with sexual activity that is simulated or implied: everything is left to the imagination. There is fondling and caressing but no direct viewing of genitals, no direct genital contact (either inter, manual or oral). Explicit scenes have been cut or edited, i.e. part of the screen will blacken until only the actors faces are revealed. Hard core typifies what is generally available in Québec: scenes of a sexually explicit nature, including oral sex, anal sex and ejaculation. Reference to "uncut versions" (which only one interviewee admitted to carrying, only after he deleted rape scenes) implies the original U.S. product which can differ from its hard-core equivalent in two ways: it may contain scenes of violence

(e.g. rape); and the duration of the scenes of sexual activity are sometimes longer than in the Québec version.

My encounter with videos containing violent sexuality was confined to specific segments of videos confiscated by members of Project "P" and previously distributed by one of my respondents (who claimed no knowledge of them only to say that he wasn't part of the company when they were in circulation). The scenes I saw were from 2 videos and they could be described as containing simulated violence, some of it of a sexual nature. For example, the rape of a woman off camera - off camera, one only heard her cries - and the subsequent "revenge" of this woman by hacking off the sex organs of her attacker - again, the only evidence of this act was the blood. Another portrayed the filming of a woman's legs being sawed off. It was noted that these films are routinely confiscated and distributors prosecuted. Kiddie-porn is thought by both police officers and distributors to be available only through underground circulation, not video stores, and cater to a small but "sick" market.<sup>13</sup>

Some respondents mentioned that they have seen "stag" movies which routinely contain standard scenes of bestiality (women and animals, available through mail order from the United States). During one interview, an office clerk (female) overheard and volunteered the information that she knew of a retailer in Scarborough who had "animal" movies under the counter. Some respondents denied the existence of this type of pornography; others knew, theoretically

they said, of its availability under the counter or out of the trunk of someone's car. Again, it is assumed that the market for this material is select and suspect.

### What sells

The video business appears to be a highly lucrative one. The market is already defined for these distributors: they know that "anything with sex sells" (they also know, and mentioned, that anything with violence sells: witness the popularity of such features as "Friday the 13th" and "Halloween"). It was mentioned a few times that most customers include an adult movies with their first rental selection after the initial purchase of their VCR.<sup>14</sup>

"What sells... star quality, good, hard sex, some story, triple X." (Q.a/f.)

"People want to see what they can't see... this challenges authority... and (re: violence) people like to be scared." (O.a/f.)

"... they want the girl next door to be bad; they must be searching for some truth - why would they keep going back?" (Q.a/f.)

In the words of one respondent, "there's a marketplace for anything." Anything with sex will sell but not every title is equally popular. What determines this popularity, almost invariably, is the cover of the video jacket. The packaging of sexual imagery is extremely important to consumer selection as

is the inclusion of name stars in a particular movie. One distributor pointed out that often the stars are only in a given movie for a short duration while another similarly noted "what rents is not necessarily what makes a good film". Two other features seem to influence or manipulate demand. Labelling a video cassette with a "triple X" sticker ensures popularity during its shelf life (estimated at about 6 months). Another factor which is good for business generally, and individual titles specifically, is the publicity generated through protest (feminist for example) and obscenity charges.

It was also noted that as women emerge as a consumer block and viewing audience they may demand movies with story lines and sex scenes which appeal to them. In "Confessions of a Feminist Porn Programmer" Karen Jaehne writes:

The actual increase in fantasy and decrease in brutality in adult movies has been found to be in a direct relationship to the increase in female viewers. Not only did we operate on the information supplied by our customer surveys that over 60% of our viewers were female, but the Playboy Channel is on record as tailoring its product to and programming for what is believed to be a dominantly female home audience.<sup>15</sup>

### The Consumer

Most distributors don't have direct access to the consumer but assume that the typical one is male, between the ages of 18-45.<sup>16</sup> It was acknowledged that some women rent videos due to the lessened

embarrassment of viewing one in the home as opposed to a theatre. One respondent speculated that women rent videos only to view them in order to "register their shock".

When contemplating the reasons why there is a demand for adult films, interviewees invariably spoke of the male consumer (the pronoun "he" was used and/or in "fleshing out" the stereotypical consumer informants often extra-polated from their own experiences/ desires to form generalizations).

"The public is a world of believers... they think there are good or bad sex films and are gullible - they don't stop looking for the good." (Q.a/f.)

The reasons for the demand are seen in ahistorical and naturalistic terms, i.e. it is argued that sex and sexual enjoyment is natural and naturally important to everyone; that videos embody a desire for sex; that sex is a tabooed area in our society and thus one lusts after the "forbidden fruit".

"We are suppressed... people don't get enough sex either that they need or think they need." (O.a.)

Videos are seen as fantasy, escapism and not to be taken seriously. Most distributors admit that their products are "boring, silly and stupid."

"I don't think sex is a spectator sport... these movies are garbage." (O.a/f.)



"Movies are fantasy, you can read evil into anything: the feminist outcry is not representative; couples watch films at home because they want privacy." (Q.a/f.)

### Familiarity with obscenity laws

Most of the interviewees have been raided on obscenity charges at least once; some are before the courts now. Most distributors, however, still have little familiarity with the current obscenity law. Three knew of the Borins judgement and were using it as a guideline.<sup>17</sup> This lack of familiarity and simultaneous complacency about it (the lack not the law) stems, it would appear, from two phenomena. After a raid, distributors respond with resilience: demand for the product is high, the drop in business is temporary and fines are "minimal". Also, because the law is not uniformly enforced (discussed under "Desired changes") most respondents felt it was a matter of interpretation and because they don't feel they are doing anything wrong, don't know how to interpret the law.

Those who were familiar with the law (three who are involved in the distribution of only adult video) were able to quote the phrases "undue exploitation" and "community standards". Beyond that all these individuals have a comprehension of the law in practical terms, i.e. as it affects their work.

The vagueness of their comprehension of the current obscenity law corresponds to the lack of precision with which it is applied. Two Québec distributors, dealing almost exclusively with adult

video, knew of the law "generally", could not paraphrase it but mentioned what was "definitely" not allowed: violence, kiddie-porn and bestiality. Other distributors exhibit confusion over what is/is not acceptable and allow that "a lot depends on how you interpret it". All are aware that what is at issue is the notion of "sexual exploitation" but there are "grey areas in all aspects of the definition (of obscenity)". In Ontario where customs and Censor Board restrictions appear to be tighter, any form of explicitness is deemed to be obscene. Thus various representations fall into this category and are cut from the original to render an "Ontario version." They are: erections, penetration, ejaculation, masturbation, violence and "of course, no bestiality and no kids". One theatrical distributor thought that "nothing degrading" was allowed.

"You can't put another person down for your own personal satisfaction." (O.a.)

#### The law: its impact on activities

Video distributors manage to operate within the confines of vague legal restrictions in a variety of ways. In Ontario, according to interviewees, all videos have been Censor Board-approved, as they were originally for theatrical release, or some distributors do their own editing and "gamble with what (we) think the Censor Board won't allow". These are: no "excessive violence against women" (e.g. a rape with other forms of violence or mutilation),

erections, penetration, genital contact, oral-genital contact, no long shots (of duration), no pelvic movement and no profanity during sex scenes.

The situation in Québec is similar: some "master tapes" (the original received from, usually, the United States) are sent to the Film Classification Board, before or after editing by the distributor. Others are edited and then distributed and a small percentage are left uncut. The biggest problem the respondents (in both Québec and Ontario) have in dealing with the law involves the lack of consistent, workable guidelines within which to operate. There are discrepancies between the authorities, i.e. raids are conducted regardless of whether videos have been Censor Board or Customs-approved.<sup>18</sup> On the other hand, there is almost total uniformity of opinion regarding what is not desirable viewing material: kiddie-porn, violence and bestiality. To that end, Québec distributors "self-regulate" with a tacit agreement among themselves to not carry the above three. Most feel this sort of material is immoral but are also concerned that, if there is a market for anything, new products will give their competitors a financial advantage. One Québec distributor (who dealt with more feature than adult titles) had a complaint centered on this insecurity regarding what is allowable. After a raid, and after confiscated tapes were returned because of technical problems with the warrant, he stopped carrying X-rated, explicit videos while his competitors continued to do so but were still not charged. He was losing money and this hurt his business.

Two distributors from Québec mentioned the problem of privacy: very small operations by individuals who work out of their cars and sell videos which have eluded customs. They do not own copyright and do not pay royalties; the tapes can then be sold to distributors at low prices. Legitimate distributors then lose some business. But piracy is extremely difficult to detect. A recent Globe and Mail article suggests that movie companies have lost up to \$10 million in revenue due to a piracy ring.<sup>19</sup>

### Customs

It is generally acknowledged that many master tapes are not viewed at customs. In the words of one distributor: "customs is a joke". Customs will often "rubber stamp" incoming videos and, according to one respondent, they don't have the facilities, personnel or time to look at everything. Some distributors send their videos to the Censor Board, either before or after editing and Québec distributors edit their videos for Ontario viewing. There is a method by which videos can make it through customs and receive Censor Board approval and still circulate in an uncut version or with scenes considered obscene by certain local authorities. There are currently (with the province of Ontario emerging as an exception) no provincial legal restrictions on or provisions for the control of home viewing of videos. Therefore, masters are not subject to approval from either customs or the respective Censor Boards. Distributors can also retain 35mm films for a period of 60 days



before submitting them for Censor Board classification. Within that period, copies of the original can be made and distributed in whatever form desired, i.e. censored or uncut.

### Community standards

In the law, obscenity means "undue exploitation of sex"; "undue" means contravening community standards. McCormack argues that the law has its biases: it is applied to pornography/adult material and little else:

In a society where a large majority of people do not read the books or see the plays and art exhibits that meet the criteria for erotic art, any distinction made on aesthetic grounds tends to be discriminatory. In other words, here as elsewhere there is one law for the rich and one for the poor, with additional discrimination against the sexual deviate: one law for the normal and one for the abnormal.<sup>20</sup>

Distributors, too, feel they can gauge the pulse of the community based on the demand for their products. The majority of respondents do not favour inclusion of the notion of community standards in a legal definition of obscenity nor do they value a law based on this assessment.

No interviewee could define or roughly put into words what a community standard might be, other than to say "it's what people living here want" and "people want to live a certain way". Nor could they speak of how it might vary from region to region or



province to province. It is almost uniformly accepted that "community standards" in theory: are different from what local police enforce; are what the Censor Board, not the community, will tolerate; or are dictated by authorities or small vocal groups. Some distributors believe that community standards are an individual thing, i.e. "everybody has their own".

When speaking of community standards in practice a slightly different picture emerges. Three respondents pointed out that sales dictate what current standards are. One argued that the notion of a community standard makes "second class citizens of some of us... a community standard should be defined by what is acceptable to the public which pays money to see (the film)" (O.a.). In other words the product should be allowed to "find its own market" (Q.a/f.).

Distributors prefer to talk of the community of Canada both because they believe standards do not vary and, as one from Ontario pointed out, his "right" and/or desire to see what he wants is curtailed. From a business point of view, without a universal standard, too much energy and time goes into marketing different versions of the same product, to satisfy supposedly different communities.

Distributors have definite opinions about what Canadians will tolerate. All distributors advocated acceptance of a "hard-core" Québec standard and its universal application. It was acknowledged

that individual and group opinion differ and that it is vocal individuals who use the notion of community standards behind which to hide, moralize and/or prosecute. However, the belief is that the public should do its own self-regulating. What is currently available in Québec - explicit sexual activity, oral, anal, group, lesbian - is understood by Québec and Ontario distributors to be acceptable and desirable to Canadians. One Québec distributor said: "people are not shocked by what they see in stores now." This sentiment is shared by Judge Stephen Borins in a judgement for the judicial district of York:

In my opinion, contemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse. Contemporary community standards would also tolerate the distribution of films which consist of group sex. However, films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed exceed the level of community tolerance.<sup>21</sup>

It was also argued that Canadians will tolerate almost anything provided they know what they're getting.

#### Desired changes

Two respondents replied that they could "live with the law" as their businesses are successful based on the volume of sales from other feature videos.

Contradictions are inherent in discussions surrounding changes other distributors would like to see in existing laws as they affect their work. For example, they confront the civil libertarian dilemma by finding certain representations morally reprehensible or "disgusting": while advocating that individuals should be able to look at what they desire, they want the "undesirables" (kiddie-porn, bestiality and violence) unavailable.

"I won't advocate the distribution of hard-core, but I have problems with censorship." (O.a.)

Anybody who wants to look at the three taboos is "sick", a "wacko" and should be denied the rights available to others. In philosophical terms they want to watch what they want (and will extend that "right" to others) but in practical terms they want a clearer definition of what is allowed/not allowed.

All respondents subscribe to the notion that videos destined for home viewing are a private matter (in the words of one: "a man's home is his castle") and should be based on individual discretion: private viewing is the important criterion here.

"You cannot tell an adult in a free society that he cannot see something. We don't force the public to buy films; there's a strong demand for adult material." (Q.a.)

Two distributors do not believe "obscenity" should be in the Criminal Code; most others want a precise, concise re-definition

of the concept, to include violence, bestiality and kiddie-porn. One mentioned as desirable the separation of sex and violence in the current wording of the law. The application of one standard for the country and consistency of this application were strongly urged.

Some respondents were concerned that U.S., uncut videos, which can contain the three tabooed areas (or longer sex scenes, e.g. "Swedish erotica" which has no story line) stay out of Canada for fear that they would threaten the Canadian market. New, more explicit products will increase sales and competition but will lower prices. Businesses might then remain in the same or weaker financial position.

One can infer from responses regarding the nature of representations of violence that distributors feel there may be a "slippery slope", i.e. a connection between the viewing of such actions and the acting out of same. Hence the desirability of restrictions to offset the descent into depravity. They would maintain however that what is available now is innocuous and that those that may be influenced have a prior susceptibility to be so, are already depraved.

"It's better that people live out their fantasies through movies not reality... if people act out violent fantasies... this is not the product of a healthy mind." (Q.a/f.)

"Distributors of such have low ethics and morals... but I don't think it's out there anyway." (Q.a/f.)

"It's not humane to enjoy being seen raped, tied, beaten or to see pictures of those. But, horror films are beautiful (i.e. they are popular and bring in a lot of money)." (Q.a/f.)

"Censorship is a necessity... bestiality, kids, violence, nobody wants this - I don't believe in the eroticization of rape. But what is excessive violence? How do you determine this?" (O.a/f.)

"If it's not inciting harm or violence, it doesn't infringe on anyone's rights." (Q.a)

In tandem with the concern with clarification of the law, and definitions of "obscene", "violence", is a further frustration with the inconsistent and idiosyncratic way that obscenity charges are laid. Raids are conducted, and video cassettes confiscated, usually by municipal authorities, often after the videos have been approved for distribution by the Censor Board or Customs (as noted in the Borins' judgement). Hence, the law is interpreted freely and inconsistently, often at the whim of a police officer or judge. It is also argued that Censor Boards themselves apply obscenity laws inconsistently depending on the individual decision-maker, as there are no objective criteria by which to define what is obscene.

### Classification

The majority of respondents favour some form of classification of videos for home viewing. Those who don't rest their case on the separation of public and private viewing. The rental and viewing of home videos is seen to be a private matter; similarly



responsibility for controlling what goes on in the home is perceived as parental and parents are charged with "censoring" what their children can watch.

One respondent favoured classification only with input from members of the industry.

Many interviewees suggested that the already existing system of classification for theatrical viewing should be applied to home videos. Again, a national standard is strongly urged, along with local enforcement. As one distributor said, communities now operate in a vacuum with a blurred distinction between what is legal/illegal.

Some distributors had some more specific suggestions for the regulation of home video rental. One suggested that manufacturers do the classifying. An age restriction (18 and over) was generally favoured, as was the practice of segregating "adult" sections in retail outlets. Other suggestions were: the issuing of permits to store owners and the removal of the picture on the cassette jacket so as not to influence children in the store. It was pointed out that from a business point of view the classification of home videos has its drawbacks. U.S. "parent" distributors issue a release date for the availability of videos in retail stores. This affects sales as new videos are released all the time. Subjection to classification will impose delays on the release date and possibly affect overall sales.

MAGAZINE DISTRIBUTION: PORNOGRAPHY?

Magazine distributors are divided on the issue of whether or not their products are "pornographic". All began by saying "no", that pornography is anything explicit (graphic depictions of sexual activity), violence coupled with sexual degradation, anything with children, animals or "unusual sex... maybe couples together in sexual activity". Again defining pornography proved to be difficult and as one respondent remarked: "pornography is within one's own mind". However, two magazine distributors thought out loud and responded: "It's all pornography". Those answers adhere to the definition of the word: "explicit description or exhibition of sexual activity in literature... intended to stimulate erotic rather than aesthetic feelings (from porné: prostitute; grapho: write)" (The Concise Oxford Dictionary, 6th edition). Both these respondents further refined the definition by noting that violence and kiddie-porn were just two forms of this "pornography" (and should be banned) and that it's all the exploitation of sex (although not undue).

Generally, the preferred label is "adult magazines" or "men's sophisticate titles". Like video distributors, those involved in the distribution of adult magazines use pornography to refer to representations with which they do not deal and that they find offensive or "obscene". They eschew the negative connotations of the word.

Hard-core magazines are those which contain photographs of explicit sexual activity, close-up shots of genital or oral penetration. These are commonly available in Québec in sex shops.<sup>22</sup> In corner magazine stores the "racier" magazines appear to contain explicit photos (judging by the cover photo and title) but are covered with plastic wrap, making perusal impossible. In a general magazine store in Montréal I found one magazine with a depiction of a woman in bondage on the cover.

In Ontario, "soft-core" is the norm and this includes representations of simulated sexual activity (no actual shots of penetration, for example) or photographs with "black dots" superimposed over the offending part of the photo, e.g. penetration. Soft core is also understood to mean that the magazine contains articles of "socially redeeming value". In an adult store on Yonge Street in Toronto I discovered 2 magazines, surreptitiously placed behind other "soft" ones, which were unmistakably "hard-core", i.e. the kind that would probably be confiscated during a raid. At Project "P" I was shown "obscene" magazines which contained images of women in bondage, or women in leather, usually brandishing a whip.

Of the four magazine distributors in the sample, one deals strictly with adult material, about 30 magazines and 40 books a month; one carries 50% adult; another about 14 titles out of 260 and one is the Canadian distributor for a British adult magazine. Two respondents are secondary independent distributors dealing with

remainders-magazines that haven't sold and are collected by "jobbers", are sold again to distributors, and then to the public, this time in packages of 2 & 3 at reduced prices. One Ontario distributor also has a mail-order video business - whose customers are mostly in Ontario - in which he distributes 8mm video (with no sound; he obtains these videos from one of the video distributors interviewed who said everything is Censor Board-approved.) These, as well as the other magazines, originate from the United States. There are a few European titles.<sup>23</sup>

Respondents deal with anywhere from 35 to 700 retailers across the country, most of them in Ontario and Québec. Only one distributor could estimate monthly sales, which he put at \$15,000. The others didn't know what their adult percentage was or, in the case of those dealing with remainders, said the figures changed every month depending on available titles.

#### What is available

In Ontario the norm of acceptability is full nudity, of men and women, simulated sexual activity (between men and women, lesbian and male homosexual sex) with, according to one respondent, erections allowed only in the last 6 years. There is no penetration, ejaculation or "full beaver spreads" (highlighted female genitalia). One Ontario distributor used to carry bondage and "spanking" magazines (images of men spanking women) but has been convicted and



no longer does. Common fare in Québec is explicit photos of sexual intercourse, oral and anal penetration, lesbian and gay male sexual activity and ejaculation. The Québec distributor said that if there was "violence" in adult magazines in Québec it was "dressed up", i.e. women in leather, often carrying whips.

No respondent claimed knowledge of kiddie-porn or bestiality except to say that maybe there was an underground market for such.

#### What sells

The magazine business is highly competitive and many magazines don't make it past volume 1, number 1. The determining factor in adult magazine popularity is invariably the cover but distributors are hard pressed to articulate what it is exactly that will capture the consumer's eye. They only know it when they see it. The decision as to what attributes go into making a successful photo presumably lie with photographers, models and editors. One distributor mentioned "busty magazines" (those with photos of women with large breasts) as big sellers. There are magazines for other specialized tastes, shots of only anal sex, for example, or magazines which contain models portraying young girls, usually engaged in masturbatory activities (always with the disclaimer that the models are 18 years of age and older).

The cover is important; so is the plastic cover, the cellophane wrap on most "racier" magazines, those most exclusively comprised



of photographs, without articles, stories or ads (Penthouse, Playboy, Hustler, Mayfair do not fall into this category, for example). The plastic cover serves a dual purpose: children cannot flip through them and the customer must make an immediate decision: to buy or not to buy. This is good for business.

Two other factors were mentioned as good for business: the anti-pornography protest stimulates interest and curiosity. Also, the by-law which stipulates that magazines must be displayed 1-5 meter above the floor meant that the (remainder) products of one distributor which formerly were kept in boxes on the floor now have more prominence in stores.

It is generally assumed that adult magazines fill a need and serve a useful and vital social function.

"They portray the expression of bottled up fantasies." (O.a/o.)

"Everybody likes sex." (Q.a.)

"We're used to looking at women's bodies." (O.a.)

Adult magazines are seen as here to stay.

#### The consumer

The consumer of adult magazines is assumed to be male. As with video distributors, speculation on customer motivation is minimal.

What matters to the distributors is whether magazines sell, not why. Some respondents were quick to point out that kids do not buy their magazines; the distributor of a soft-core magazine assumed his consumers were "upper income, more sophisticated". It appears that adult magazines, like others, can be stratified according to the consumers' class or lifestyle. Magazines which enjoy a less sullied reputation (e.g. Penthouse and Playboy) would cater to men whose consumer interests are decidedly middle to upper class, judging by the articles on and ads for cars, stereos and other expensive items and hobbies, e.g. photography. There are also articles on politics and high-brow culture. Alternatively, Hall argues that Hustler functions as a "carrier of working class consciousness". Through its editorial policy (August 1977: "... Hustler gives the average man in America what he has wanted in a publication, but has been denied in the past and presents the information in terms he can understand... Hustler has become a voice for these previously ignored people") and "Promethean bad taste", Hustler debunks the establishment, institutions and agents of authority, but in highly individualistic terms. The reader, loyal according to Hall, is able to maintain a posture of defiance, "finger the system," but the ultimate message is that, unlike the middle-class reader of Playboy, his power doesn't extend beyond himself.<sup>24</sup> Interestingly, certain protests suggest that Penthouse and Playboy (and others of their ilk) are acceptable, maybe unappealing but innocuous, but the "average man's" (i.e. working class) magazines are deemed offensive (e.g., Hustler). The class bias of their argument eludes them.

### Familiarity with obscenity laws

As with video distributors, the magazine distributors understand the obscenity laws in terms of how they affect their work. Two were familiar with the wording of the law yet all still argued that in practice the interpretation of the law was dependent on which individual or body was doing the enforcing. In Ontario this is assumed to mean that violence and cruelty towards women was not allowed (although, clearly, neither is anything graphic). It was mentioned that in Toronto there used to exist a "working relationship" between municipal police and retailers whereby the latter would be advised to remove "obscene" material from the shelves. Apparently raids are now conducted without warning.

The Québec respondents thought there was a "list" at Customs which stipulated what was acceptable but also thought that interpretation of this list depended on the whim of the individual on duty.

"On paper nothing is allowed... but things get in depending on who decides." (Q.a/o.)

### The law: its impact on activities

All but one respondent has been raided. All experience frustration with the vicissitudes of the law's interpretation and, like video distributors, gamble with what they think is acceptable. One

Ontario distributor submits his publications to the Ontario Advisory Committee. The OAC is a committee of three professionals (a psychologist, a law professor and an editor) approved by the Attorney General of Ontario and retained by magazine wholesalers to inform them on contemporary Canadian community standards. The committee is powerless - merely advisory. Another Ontario respondent has been the victim of raids, the subject of which was material which had already been cleared through Customs. He said: "I might as well deal with underground material if the cleared stuff is considered illegal anyway".

#### Customs

All respondents reported that their material was cleared at customs. All showed me sample letters to that effect. It seems that it is often up to the distributor to submit a publication for Customs approval. Customs then make the necessary editorial suggestions before the magazine is returned to the publisher who then issues a version toned-down for the Canadian market. The toned-down copy will often have specific photographic spreads (usually those deemed violent, i.e. with leather) deleted; photos with graphic shots of penetration contain a black dot covering the offending part of the photo.

One Ontario distributor noted that following the Borins' judgement one video distribution, Customs officials were now "on the look out" for violence in cartoon and the narrative accompanying photographs.

Community standards

"I believe there's a silent majority which will tolerate the explicit stuff." (O.a.)

"I have lost the concept of what a community standard is." (O.a/o.)

It is assumed that theoretically it is impossible to conceptualize a community standard. Yet again, in practice distributors are able to articulate what they think Canadians will tolerate in adult magazines. There is fear that the decisions as to what is acceptable will be left to an arbitrary body or the whim of an individual.

What are identified as not acceptable are: violence (bondage and sado-masochistic representations), kiddie-porn and bestiality. It is believed that "normal sex", fellatio, cunnilingus and depictions of homosexual activity are tolerated and desired. It was pointed out by the Québec respondent that the most explicit material, maybe containing depictions of the tabooed representations, is often available in rural areas because urban police forces can't reach there and therefore raids are infrequent.

It can be argued that distributors know there is such a thing as community standards (and that they might vary) but don't want to live with the consequences. For example, one respondent mentioned that he supported the by-law imposing height restrictions on the sale of adult material; he also had made suggestions to his



publishers to tone down the covers of their magazines destined for the Canadian market. This implies that distributors know what is tolerable, i.e. what the standard of the community is (at least the community of Canada), yet begrudge it at the same time. They resent the imposition of restrictions on their activities and, as businessmen, see the necessity of other measures such as having to gage what is acceptable and dealing with Customs as a time expenditure and something that may possibly affect sales. If there is a market for something, most want to tap it regardless of their moral concerns or the moral concerns of others.<sup>25</sup>

#### Desired changes

Respondents have a uniform view on the necessity and desirability of clear guidelines, one standard that is applied consistently. None sees the merit of the availability of "pornography" (kids, animals, violence) in Canada. All voiced concern that materials can be confiscated after they have been cleared at Customs. They see this situation as hypocritical and idiosyncratic. To that end two suggestions were put forth: obscenity should be taken out of the Criminal Code and there should be one central clearing house for materials such that once they are let in the country no charges will be possible.

CONCLUSION/SUMMARY

The preceeding can perhaps be characterized as a distillation of the ideal-typical distributor and distribution practices of adult material. The current situation with respect to the distribution of adult magazines and videos can be summarized in the following way. Apparently what is generally available to the public differs in Québec and Ontario. It appears that both magazines and videos vary according to the levels of sexual explicitness. Publications (magazines, videos and 35mm films) which are distributed in Québec are graphic in nature, depicting "real" sexual activity. In contrast, commonfare in Ontario are representations of simulated sexual imagery, and penetration, for example, is taboo. The circulation of publications which contain depictions of violence and/or kiddie-porn and bestiality appears to be underground in origin. Whether or not this latter situation is harmful is the subject of debate. At the present time the "problem" seems to be a small one. In his submission to the Special Committee on Pornography and Prostitution, the President of Benjamin News, Mr. Gerald Benjamin, writes:

(With respect to) hard core pornography and obscenity... Nothing of this nature is knowingly distributed by PDC members. This is not to say there may not be occasions, however, when such material may get by Canada Customs, or may get by the Advisory Committee, or may slip through unnoticed at the wholesaler level, among the many thousands of periodicals and books that our members must handle.<sup>26</sup>

In other words the legitimate channels for the distribution of such material appear to be weak. Dismissing the problem on this basis may be akin to saying: "only 100 women have died from toxic shock". However, this implies two things: that the material is intrinsically harmful; and its production is most likely underground and therefore outside the mandate of censorship or other legal restrictions.

The obscenity law is currently unevenly enforced. There are disparities in the situations in Québec and Ontario, in terms of what is considered acceptable. Furthermore, inconsistencies are apparent in the way various levels of authority interpret and apply the law. Officials with the power to enforce the law are vague as to its definition; and so are distributors who must try to work within unclear guidelines. Thus, it might be useful, conceptually and legally, to distinguish between adult material and pornography: kiddie-porn, bestiality and violence, to clarify what we are addressing in this "pornography debate". But that still leaves the problem of violence in other contexts. Sexual violence is considered to be more obscene than other forms of violent imagery. The mutilation of genitals is more offensive than, say, the sawing off of one's limbs. Right now only the former is considered obscene. As a video distributor noted: "If you chop a woman's head it's OK; if you fondle her breasts first and then chop off her head, it's obscene". The very process of defining what constitutes pornographic imagery points to a divided community and the instability of community standards.

One other useful move may be to segregate adult material and pornography into separate stores so as to clearly demarcate the market for such material and prevent involuntary exposure. The question of self-regulation was raised and quickly eschewed by the respondents as they quite blatantly stated that they didn't trust each other and would rather leave decision making to those with the power to do so. As businessmen they don't want to actively flirt with breaking the law and thus seek clear guidelines and their consistent and uniform application.

There are contradictions in debates surrounding sex in the public domain. The variances in discourse are reflected in the way distributors frame the rhetoric of their work. The most obvious incongruity surfaces around notions of what makes good business sense and respondents' own sense of morality. Very few respondents would curtail the distribution of products which they identify as offensive if they were guaranteed to produce a profit. Distributors prefer a position of non-involvement in any sort of moral debate regarding the possible turpitude of pornography and/or adult material.

They are also aware that the attention and publicity created by discourses at various levels of society (the media, political interest groups, religious affiliations) are beneficial to business; keeping the moral issues alive and unresolved, it can be argued, may catalyze interest in the product and hence demand.



While distributors state that they believe they have the right to see whatever they desire, they will specify what they want deleted from public viewing. In other words, they would like to deny others the privilege they would allow themselves. That asymmetrical notion also unwittingly fixes the debate at an anti-social, individualistic level, whereby pornography or adult material is ultimately to be defined by the beholder/buyer - an individual, not a critical mass.

There are inconsistencies in academic and social discourses on the sexual problematic. These exchanges posit a recognizable distinction between pornographic imagery (assumed to be sadistic) and explicit depictions of sexuality (considered harmless or even educational, e.g. an illustration in a medical textbook). Thus, anti-pornographers implicitly denounce not what is shown but how. Willis writes:

The fallacy here is that the range of potentially pornographic images - that is, images primarily used for the purpose of sexual arousal - is limited only by the user's imagination. Even if one wants to argue that the use of an image for sexual gratification requires a sadistic fantasy, the image itself may be 'objectively' innocuous. And what about cryptopornography like Gothic novels? The appeal of Gothics is also rooted in sado-masochism, and just as Hustler magazine shows men how to act like rapists, Gothics show women how to act like victims. The crucial difference is that Gothics purvey a repressed, romanticized sexuality, while hard-core pornography is explicitly lustful and genital.<sup>27</sup>



Willis points to another fissure in the debate. Visual imagery is the object under scrutiny and is assumed to be more subversive than narrative. This imbalances the discussion by disfavouing one form of sexual explicitness over another, one genre against another.

The "pornography issue" can be further stratified into those who want to argue that the image and the act can be conflated and those who posit that violence against women is not the same as its imagery. The tension may not be resolved. What can be stated is that other models exist (through socialization and other forms of imagery) and that sexual expression may assume many forms: violence is only one of them and is, more importantly, not restricted to visual imagery. Clearly the problem is not one of genre but sexual politics. The conditions which give rise to asymmetrical sexual imagery, imagery which associates male power with the phallus warrants further consideration.<sup>28</sup>

Another bias surfaces around the distinction between pornography and erotica, in the popular lexicon. Offensive photos are those which portray women who approximate the "everyday", they are the "girl next door" but they certainly aren't nice. They are too real, too common: models in these representations (e.g. Club International, Gent: Home of the D Cups, both available in Ontario) often have soiled hair, chipped finger nail polish, runs in their stockings. Or they are photographed in less opulent surroundings, the photos are of a poorer quality, with poor lighting and obvious touch-ups

thus destroying the fantasy of the innocent "model of perfection". Their femininity is not without blemish. Erotic (read: classier) publications however are deemed inoffensive. Models in the photos contained within them have achieved the status of physical perfection as only the very wealthy and leisured can. The elusive, elite woman without blemish is OK; her working class sister, a poor imitation, is not.

The demand for videos and magazines of a sexually explicit nature is commonly a male phenomenon. In "straight" films there are not scenes of male homosexual sex: because this would involve erections, penetration and ejaculation, in Ontario at least these are tabooed. But all distributors responded with repugnance at the idea: these videos and magazines are for the pleasurable viewing of men. But what of women's desire? This raises other more theoretical questions concerning the conditions which give rise to the dominant sexual representations which exist and the purposes they serve. Pornography and sexually explicit material should be understood in historical context. Blachford argues that the growth of sexually explicit material is coincident with the increase in the concern for privacy and the confinement of sexuality to a separate and insulated sphere of one's life. This material is fantasy, shaped by ideological values which are not random.<sup>29</sup> In this sense, pornography and adult material are continuous with other discourses on sex. The pornographic discourse, or monopoly of knowledge, naturalizes sex and sexualizes nature but does so within the context of knowledge that is already

accessible to its consumers. The problem might be then that power and the phallus are aligned, not that this is depicted in pictures. Carter notes that rather than inciting sexuality, pornography defuses its expressive potential by keeping it in its place, outside of everyday human intercourse: it titillates desire but never assuages it.<sup>30</sup> The task then would be to eroticize human expression and this would involve all aspects of humanity, not just the visual. Replacing what does exist has greater potential than obliterating it.



Notes to Introduction

1. Les Whittington, "Video pornography difficult to curb,"  
The Ottawa Citizen, 26 November, 1983; Tom Bierbaum,  
"VCR boom continues unabated," Variety, 203:39, 30  
April, 1984.





Notes to Methodology

1. Zuhair Kashmeri, "Officials say criminals control sex industry," The Globe and Mail, 9 February, 1984;  
Bryan Johnson, "The Porno Scene: is it unreal?" The Globe and Mail, 20 August, 1983.



NOTES TO TEXT

1. John Ellis, "Photography/Pornography/Art/Pornography", Screen, 21:1, Spring 1980.
2. Ellis, op cit., 84.
3. Ellis, op cit., 90.
4. Ellis, op cit., 84.
5. Jillian Riddington, "Discussion Paper on Pornography", prepared for National Action Committee on the Status of Women, March 1983, p. 4; cf. also Laura Lederer (ed.) Take Back the Night, New York: William Morrow and Company, 1980; Lorenne M.G. Clark, "Liberalism and Pornography," Pornography and Censorship, edited by David Copp and Susan Wendell, New York: Prometheus Books, 1983; cf. also articles by Ann Garry and Susan Wendell in the same volume.
6. "Some feminists cannot digest the concept of benign sexual variation." Deirdre English, Amber Hollibaugh, Gayle Rubin, "Talking Sex: A Conversation on Sexuality and Feminism", Socialist Review, #58, 11:4, July-August 1981, p. 43; and Pajakowska argues that there is a political problem with the convergence of rightist and feminist positions on pornography. The unintended focus is on certain sexual practices such that "anything goes" as long as it "goes" within a "meaningful relationship and doesn't involve violence. This set of assumptions reconfirms the marginality of sexual behaviour such as s&m, transvestism, transsexualism, paedophilia, homosexuality and lesbianism and prostitution." "Imagistic Representation and the Status of the Image in Pornography", Ciné-Tracts, 3:3, Fall 1980, p. 13.
7. Ros Coward, Yve Lomax and Kathy Myers, "Beyond the Fragments", Camerawork, November 1982.
8. Varda Burstyn, "Pornography and Eroticism", Fuse, 6:1/2, May/June 1982.
9. Thelma McCormack, "Understanding Pornography", Canadian Woman Studies, 4:4, Summer/August 1983.
10. Ellis, op cit.
11. Riddington, op cit.; Wendell, op cit.

12. Quotation are drawn from interviews with distributors of adult video and magazines. To identify the speaker I have indicated the province in which he works (Q or O) and the material in which he deals (video - a, adult; a/f, adult/feature; magazines - a, adult; a/o, adult/other).
13. Bryan Johnson, "The Porno Scene: is it unreal?" The Globe and Mail, 28 April, 1984.
14. Brenda Zosky Proulx, "Video Porn: Where do we draw the Line?" The Montreal Gazette, 2 June, 1984.
15. Karen Jaehne, "Confessions of a Feminist Porn Programmer"; Film Quarterly, 37:1, Fall 1983, p. 15.
16. A study conducted by the NFB determined that those renting videos of all kinds were between the ages of 18 and 35. "Les Membres Clubs Video du Québec", Colette Noiseux, Office National du Film du Canada". Septembre 1983.
17. Judge Stephen Borins, for the Judicial District of York, in October 1983, found the Doug Rankine Company and Act 111 Video Productions guilty of obscenity charges because some confiscated videos contained depictions of "degradation, humiliation, victimization and violence in human relationships as normal and acceptable behaviour". Scenes of explicit sexual activity were deemed to be acceptable to the community, however.
18. In his judgement, Borins noted that 8 of the 18 confiscated films had been approved by the Ontario Censor Board and thirteen had been viewed at Customs and did not contravene the Customs Tariff Act which prohibits the importation into Canada of goods "of an immoral or indecent character".
19. Zuhair Kashmeri, "Obscenity probe turns up video piracy", The Globe and Mail, 6 June, 1984.
20. Thelma McCromack, "Censorship and 'Community Standards' in Canada", Communications in Canadian Society, edited by B.D.
21. Borins, op cit., 28-9.
22. At the sex shops I have seen, one's view inside the store is obstructed by, usually, a curtain, one must be at least 18 to gain admittance and often there is a cover charge which is deducted from a purchase.
23. Elite, Honey, Fox and Manhattan used to be published in Canada by a Canadian, David Wells, but his former distributor told me that the publications could not make it financially. Elite used to sell 50,000 copies a month.



24. Dennis R. Hall, "A Note on Erotic Imagination: Hustler as a Secondary Carrier of Working Class Consciousness", Journal of Popular Culture, 15:4, Spring 1982.
25. In response to a newspaper article which told of the chairperson of Expo '86 resigning from presidency of his distribution company (which distributes adult magazines and possibly pornography) after charges that he was not a respectable businessman, a respondent mentioned his lack of admiration for such a move. He fears the bad name the business has and refuses to believe there is any moral harm in it. cf. "Expo '86 head hit for porn links", The Ottawa Citizen, 4 April, 1984.
26. Gerald Benjamin, "Presentation to the Special Committee on Pornography and Prostitution", 6 April, 1984.
27. Ellen Willis, "Nature's Revenge", The New York Times Book Review, 12 July, 1981.
28. Richard Dyer, "Don't Look Now", Screen, 23:3/4, September-October 1982.
29. Gregg Blachford, "Looking at Pornography", Screen Education, 29, Winter 1978-9.
30. Angela Carter, The Sadeian Woman, London: Virago, 1979.



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#### Newspaper Articles

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4 April, 1984.

## APPENDIX 1: Interview Schedule

Respondent \_\_\_\_\_

Company

magazines                      videos

which kind/genre?

titles

Who produces them (any Canadian)? Where do they come from?

Who, in country of origin, distributes the material?

# of retailers under auspices of distribution company/respondent.

Monthly sales? % from adult titles.

Are you familiar with the laws on obscenity?

How do you believe they work in practice? Are they evenly enforced?

How do you manage to operate within the law?

How do you define community standards?

Does a law that is based on this assessment make sense?

Has the law had an impact on your activities, i.e. what you distribute, where and to whom?

Have you ever been raided, sued?

Can you describe your dealings with customs?

What changes would you like to see in the law as it affects your work?

Comment on the classification of home videos. Is this inevitable?  
desirable?

How would this work? How should it work?

Would you be willing to pay the Censor Board to review and classify your products?

Do you consider your work pornographic?

How do you define pornography?

How should it be defined?



What is the distinction between hard and soft pornography?

Who do you think buys/rents magazines/videos?

Why do you think there is a desire for these titles?

Are magazines feeling competition from videos?

What are the most popular images in your products? What sells?

Do covers matter? Comment on the plastic wrap.

Are you part of a larger organization?

Comment on self-regulation. Is this desirable? How should it work?

APPENDIX 2: Partial list of available magazines

Mayfair  
Hustler  
Bust Parade  
Cheeks  
Bottom  
Fanny  
Legs and Asses  
Legs Boobs Lingerie  
Hot Legs  
Standing Tall  
Legs Legs Legs  
Hot Wet Pussies  
Hefty Mamas  
Floppers  
Erect Nipples  
Busting Out  
Anal Babes  
Strip Tease  
Crotches  
Latin Babes  
Ladies in Lace  
Ass Parade  
Split Beavers  
Shaved  
Geisha Girls  
Melons & Mounds  
Milky  
Milk  
T.V. Action  
Naked Nymphs  
Hot Buns  
Eros  
Skinflicks  
French Pussy  
Female Flesh  
Baby Face  
Peach Fuzz Pussies  
Rapier

Chunky Asses  
Sweet Ass  
Sweet Asses  
T.V. Queens  
Big Bust Vixen  
Hanging Breasts  
Kingsize  
Tits 4 U  
Tit Hangers  
Ass Holes  
Leg Parade  
Leg Show  
Tip Top  
T.V. Treats  
The Queens  
Drag Queens  
T.V. Switchers  
Les Femmes  
Skirts Up  
Tease  
T.V. Lovelies  
Knockers & Nipples  
Foxette  
Gent: Home of the D-Cups  
Club International  
Celeb  
International H&E Monthly  
Fiesta  
Adam  
Men Only  
Torso (for men)  
Mandate (for men)  
Blueboy (for men)  
Penthouse  
Playboy



IN THE COUNTY COURT JUDGES' CRIMINAL COURT FOR THE JUDICIAL  
DISTRICT OF YORK

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B E T W E E N:

HER MAJESTY THE QUEEN

AGAINST

DOUG RANKINE COMPANY LTD.  
AND ACT III VIDEO PRODUCTIONS  
LTD.

)  
)  
) Appearances:

) Peter DeJulio Esq.,

) - for the Crown

) E.L. Greenspan Esq., Q.C.,  
) and Marc Rosenberg Esq.,

) - for the Accused

) Heard:

) September 12, 13 and 14,  
) October 17 and 18, 1983

) Judgment: October 24, 1983

REASONS FOR JUDGMENT

BORINS, C.C.J.

In this case Doug Rankine Company Ltd., and Act III Video Productions Ltd., are charged jointly with the distribution of obscene publications, namely, the 18 motion pictures recorded on video cassette tapes listed in Schedule "A" to the indictment. Act III Video Productions Ltd., is also charged with the distribution of additional obscene publications which consist of the 7 motion pictures recorded on video cassette tapes and listed in

Schedule "B" to the indictment. Both offences are alleged to have taken place from December, 1982 to April, 1983. The only issue to be decided is whether the prosecution has proved that the motion pictures, or some of them, are obscene pursuant to the provisions of s.159(8) of the Criminal Code.

The relevant facts are not in dispute and have been agreed to by counsel for the parties. Both defendants carry on business in Toronto and are distributors of video cassette tapes. Act III Video Productions Ltd., is also responsible for the physical reproduction of the cassette tapes. A number of the tapes listed on Schedule "B" were delivered by Act III to a company known as Montevideo Entertainment in Montreal, which is the main distributor of the tapes in question in Quebec and elsewhere in Canada other than in Ontario. A quantity of the tapes listed in Schedule "A" were taken from the warehouse of Act III to the premises of Doug Rankine from which that defendant shipped a number of the tapes to four other distributors. During the time period alleged in the indictment Doug Rankine shipped a total of 2,840 video cassette tapes, being various quantities of the titles listed in Schedule "A", to the four distributors who in turn distributed them to many retail stores in Ontario for rental to the ultimate consumer. Each tape is packaged in a container which displays a sexually provocative photograph and a description of the motion picture. The tapes are displayed in the retail stores and rent for an average of \$4.00 per tape per day. The tapes are available for



distribution to any person who is able to pay the appropriate rental cost.

As evidence of current community standards the defendants tendered as exhibits a number of motion pictures approved by the Ontario Censor Board in the period from 1971 to 1983. These moves are: "I the Jury", "Tattoo", "A Clockwork Orange", "Lipstick", "The Story of O" and "Videodrome". All of these films were displayed commercially throughout Canada. The Ontario Censor Board restricted admittance to all of the films to persons 18 years of age or over. Of the films listed in Schedules "A" and "B" the following were approved by the Quebec Censor Board for viewing in movie theatres by persons 18 years of age or over: "Games Women Play", "Skintight", "Adventures Amoureuses de Monsieur O", "8 to 4", "Tara", "Scrabble D'Amour", "Please Mr. Postman", and "Memphis Cathouse Blues". In some instances the approval of the Censor Boards of both provinces were subject to certain modifications of the films. Also, evidence in the form of letters from Revenue Canada Customs and Excise indicate that 13 of the video-cassettes in issue had been viewed and admitted into Canada as not coming within the provisions of tariff item 99201-1 of the Customs Tariff Act, R.S.C. 1970, chap. C-41, which prohibits the importation into Canada of goods "of an immoral or indecent character". As well, two of the films, "Erotic Women in Love" and "3,4,5 and More" are montages which are comprised of scenes taken from films approved by Customs for entry into Canada. Thus, 15 of the films are foreign in origin

and received Customs approval. The remaining films were all purchased in Canada. Douglas Rankine, who is the sole shareholder and employee of Doug Rankine Company Ltd., personally screened all films his company distributed in Ontario and required that some films be edited before their release. On some occasions Mr. Rankine refused to distribute films which he considered to exceed the level of contemporary community tolerance.

Three witnesses were called by the Crown. No witnesses testified for the defence. As a result of an out of court interview given to the media by the witness Nancy Pollock prior to the completion of her evidence, counsel proposed that her evidence be disregarded. This leaves for consideration the evidence of Josephine Walker and June Rowlands. Mr. Greenspan has submitted that their evidence should be disregarded because they used the court as a political forum to present what he characterized as the "fashionable notion of militant feminism". He argued that the case must not be decided pursuant to the dictates of a particular segment of society which advocates a particular viewpoint. I agree with this submission, but I do not agree that I should ignore the evidence of Mrs. Walker and Mrs. Rowlands. What they said is as much evidence of "what is happening around [me]", to again use Mr. Greenspan's expression, as are the motion pictures filed by the defence and the evidence of the approval of certain motion pictures by the provincial censor boards and by Revenue Canada. The evidence of Mrs. Walker and Mrs. Rowlands may or may not be worthy of substantial weight but this is not to say that it should

be rejected.

Mrs. Walker has been a teacher for 23 years in the public school system in Scarborough, which is part of Metropolitan Toronto. She is a member of the Federation of Women Teachers of Ontario, which has 31,000 members, and is one of 580 delegates to the Federation's annual meeting. She was the sponsor of a resolution adopted by the delegates this summer on behalf of the Federation opposing "materials depicting women or children in degrading or sadistic sexual roles". She said she could not speak on behalf of the Federation or the 580 delegates. However, Mrs. Walker said that as a result of discussions with other teachers and with parents and others she believed that she could express contemporary community standards of tolerance. She saw five of the motion pictures before the court: "Skintight", "Tale of Tiffany Lust", "Anna Obsessed ", "Undulations", and "Scrabble D'Amour". It was Mrs. Walker's opinion that the contemporary Canadian community would not tolerate the distribution of these motion pictures in the form of video cassette tapes. In great detail she described a number of scenes in the films which resulted in her conclusion that the community would not tolerate their distribution. However, when cross-examined Mrs. Walker explained that she was unable to reflect Canadian standards as she has never been out of Ontario. As she put it, "everything I know has been confined to the borders of Ontario". Mrs. Walker conceded that perhaps 70% of the population of Ontario is indifferent to the distribution of the tapes and that she did not represent the views of the remaining 30%.

She admitted that her views on pornography were influenced by the National Film Board film, "Not A Love Story". She stated that she has seen very few films in movie houses. She perceived the Ontario Censor Board to reflect the standards of the contemporary Canadian community. In my opinion, Mrs. Walker's testimony cannot be regarded as representing the opinion of the contemporary Canadian community nor can it be regarded as an opinion of the level of tolerance common to the contemporary Canadian community. At the very most her evidence is reflective of the views of a very small segment of society and one which holds very strong views supporting the suppression of films similar to the five which she saw. In short, Mrs. Walker represents a particular point of view and her evidence must not be given great weight.

On the other hand, while Mrs. Rowlands also advocates a particular opinion, I believe that she has reached her opinion on the basis of a greater sampling of public views than did Mrs. Walker. Of course, Mrs. Rowlands did not conduct any surveys. However, as an elected Alderman in the City of Toronto and a member of various committees, organizations and boards in Metropolitan Toronto she has had the opportunity to meet and speak to many people and is in a very good position to offer her opinion with respect to community standards in Metropolitan Toronto. Indeed, Mrs. Rowlands made it very clear that she could speak only of the level of tolerance within Metropolitan Toronto. Mrs. Rowlands saw



parts of three films which are before the court: "Undulations", "Skintight", and "A Coming of Angels". It was her opinion that elements of sex, violence and brutality in "Skintight" and "A Coming of Angels" would result in these films not being tolerated by the contemporary community in Metropolitan Toronto. However, she was of the opinion that "Undulations", which she said consisted mainly of "sexual acrobatics", would be tolerated. Mrs. Rowlands testified that in her opinion the contemporary community of Metropolitan Toronto would tolerate the following elements in a video cassette tape: explicit scenes of oral sex, masturbation, sexual intercourse and group sex involving three or more people, voyeurism and offensive language. However, she was of the opinion that the following elements would exceed the level of community tolerance in Metropolitan Toronto: scenes of men ejaculating on women's faces, penetration of the vagina by foreign objects such as corn cobs, explicit scenes of buggery, a woman urinating into a pot, a man inserting a candle into his anus, sexual intercourse with women portrayed as young girls, and scenes of sexual intercourse coupled with violence and cruelty. It was the opinion of Mrs. Rowlands that most women would not tolerate the distribution of motion pictures depicting sex and violence. She said that the great lie of such films is that they depict women as enjoying sex and violence. She stated that there are many men who share the same opinion of such films.



I preparing my reasons for judgment I have had the advantage of reading a transcript of the evidence. I am bound to say that I was very impressed with the testimony of Mrs. Rowlands when she testified and I was more impressed with it after reading the transcript. I reject the characterization placed on it by Mr. Greenspan. He called it the "fashionable notion of militant feminism". In my view Mrs. Rowlands answered the questions both thoughtfully and fairly and did not use the occasion of testifying to turn the courtroom into a political forum. I must confess that most of her answers did not surprise me - although some of them did. I can think of very few women in this country who would tolerate the distribution of motion pictures portraying indignities to other human beings, particularly women, in the name of entertainment. A woman does not have to be a "militant feminist" to be intolerant of what is portrayed in many of the films before the court. Nor does a woman have to be a "militant feminist", or any other type of feminist, to believe that the distribution of such films would be unacceptable on the basis of current community standards. She need only be a person who respects the dignity of life and rejects those who seek to degrade it. True it is that Mrs. Rowlands does not purport to express an opinion of the level of tolerance of the entire contemporary Canadian community. However, careful attention should be paid to her testimony. There are well over a million women in Metropolitan Toronto. She has testified to what she believes to be the level of tolerance of a majority of them.

Turning to the law, both counsel reviewed the modern history of the law of obscenity in Canada and the United States. The starting point is s.159(8) of the Criminal Code which reads as follows:

"159(8). For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty, and violence, shall be deemed to be obscene".

It is conceded by the defence that the dominant characteristic of all of the motion pictures is the exploitation of sex and, in some of the motion pictures, the exploitation of both sex and violence. The prosecution and the defence part company on the central issue of whether the exploitation of sex and of sex and violence is "undue". The entire case, therefore, comes down to the test which must be applied - and the application of the test - to determine whether the Crown has satisfied the burden which rests on it to prove beyond a reasonable doubt that the exploitation of sex and sex and violence is "undue" as that term has been defined by the courts.

It is unnecessary to review in great detail the development of the law of obscenity in Canada. The law has been stated authoritatively by the Supreme Court of Canada and, subject to what I will say about the role of The Canadian Charter of Rights and Freedoms in the application of the law, it does not rest upon this court to take a new approach to the law of obscenity.

The significant judgments of the Supreme Court of Canada are Regina v. Brodie, (1962) 132 C.C.C. 161 and Regina v. Dominion News and Gifts (1962) Ltd., [1964] 3 C.C.C. 1 in which the Supreme Court adopted the reasons given by Freedman, J.A., in the Manitoba Court of Appeal: [1963] 2 C.C.C. 103 at 115. These cases and others were reviewed by the Ontario Court of Appeal in Regina v. Sudbury NewsService Ltd., (1978) 39 C.C.C. (2d) 1 where the test to be applied in determining whether or not the prosecution has proved that a publication is obscene is discussed by Howland, C.J.O. at 6:

"Let me turn now to the question of obscenity. At least as far as publications are concerned, it has now been determined by the Supreme Court of Canada in Dechow v. The Queen (1977), 35 C.C.C. (2d) 22, 76 D.L.R. (3d) 1, 40 C.R.N.S. 129, that the definition of obscenity in s.159(8) is exhaustive. Under s.159(8) of the Code, for a publication to be deemed to be obscene it is not sufficient that a dominant characteristic of it has been the exploitation of sex. There must have been an 'undue' exploitation of sex. In determining what is undue exploitation within s.159(8), the test to be applied is whether the accepted standards of tolerance in the contemporary Canadian community have been exceeded."

At 7 Howland, C.J.O. continues:

"It is the standards of the community as a whole which must be considered and not the standards of a small segment of that community such as the university community where a film was shown (R. v. Goldberg et al (1971), 4 C.C.C. (2d) 187, [1971] 3 O.R. 323) or a city where a picture was exposed: R. v. Kiverago (1973), 11 C.C.C. (2d) 463. The

standard to be applied is a national one, *R. v. Cameron*, [1966] 4 C.C.C. 273, [1966] 2 O.R. 777, 58 D.L.R. (2d) 486; *R. v. Duthie Books Ltd.*, [1967] 1 C.C.C. 254, 58 D.L.R. (2d) 274, 50 C.R. 55; *R. v. Ariadne Developments Ltd. et al.* (1974), 19 C.C.C. (2d) 49 at p. 59, 8 N.S.R. (2d) 560."

Although s.159(8) speaks of a "publication" and although "publication" is not defined in the Criminal Code, it would seem that the courts have interpreted the word as including video cassette tapes and motion pictures: see, o.g., *Regina v. Times Square Cinema Ltd.*, (1971) 4 C.C.C. (2d) 229 (Ont. C.A.); *R. v. Odeon Morton Theatres Ltd.*, (1974) 16 C.C.C. (2d) 185 (Man. C.A.). It would seem, therefore, that "publication" as used in s.159(8) is not confined to anything produced by the medium of print such as a book or magazine.

In discussing how the judge or jury should approach the question of community standards Howland, C.J.O. states at 7-8:

".... The trier of fact, Judge or jury as the case may be, will no doubt rely on the best evidence available and will draw on a lifetime experience in the Canadian community. The task is to determine in an objective way what is tolerable in accordance with the contemporary standards of the Canadian community, and not merely to project one's own personal ideas of what is tolerable. Expert evidence has to be considered in determining the weight to be given to it, but it can be rejected in its entirety if the conclusion is reached that no finding can be based on it. Expert evidence may be of considerable assistance, particularly in areas where the Judge or jury making the determination has no expertise, such as the understanding and appreciation of art ...."

However, these comments appear to have been qualified somewhat by subsequent decisions. For example, in Regina v. Popert, (1981) 58 C.C.C. (2d) 505 (Ont. C.A.) at 508 Zuber, J.A. states:

"In my view, the learned trial Judge was in error. The reference to a community standard imports an objective test into the ascertainment of indecency and immorality and while evidence with respect to community standards is admissible and sometimes helpful, it is not a fact which the Crown is obliged to prove as a part of its case: see R. v. Prairie Schooner News Ltd. and Powers (1970), 1 C.C.C. (2d) 251, 75 W.W.R. 585, 12 Crim. L.Q. 462; R. v. Great West News Ltd., Mantell and Mitchell, [1970] 4 C.C.C. 307, 10 C.R.N.S. 42, 72 W.W.R. 354".

See, also, Regina v. Sidey, (1980) 52 C.C.C. (2d) 257 (Ont. C.A.) and Re Regina and Provincial News Co. and Two Others, (1974) 20 C.C.C. (2d) 129 at 137 (Alta. C.A.).

A very helpful discussion of the factors to be taken into account in ascertaining community standards is found in the reasons for judgment of Freedman, J.A. in the Dominion News case, supra, at 116-117, where he discusses the application of the test to two magazines:

"Can it fairly be said that this was a dominant characteristic of either Dude or Escapade? I have examined them both with care. That they do not qualify as reading matter which I would personally select for myself even in an idle hour is undoubtedly the case. But that does not make them obscene. In this area of the law one must be especially vigilant against erecting personal tastes or prejudices into legal principles. Many persons quite evidently desire to read these magazines, even though I do not. I recognize, of course, that the mere numerical support which a publication is able to attract is not determinative of the issue whether



it is obscene or not. Let a publication be sufficiently pornographic and it will be bound to appeal, in the hundreds or thousands, to the prurient, the lascivious, the ignorant, the simple, or even the merely curious. Admitting, therefore, that a large readership is not the test, I must yet add that it is not always an entirely irrelevant factor. For it may have to be taken into account when one seeks to ascertain or identify the standards of the community in these matters. Those standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered. Obviously this is no easy task, for we are seeking a quantity that is elusive. Yet the effort must be made if we are to have a fair objective standard in relation to which a publication can be tested as to whether it is obscene or not. The alternative would mean a subjective approach, with the result dependent upon and varying with the personal tastes and predilections of the particular Judge who happens to be trying the case.

Community standards must be contemporary. Times change and ideas change with them. Compared to the Victorian era this is a liberal age in which we live. One manifestation of it is the relative freedom with which the whole question of sex is discussed. In books, magazines, movies, television, and sometimes even in parlour conversation, various aspects of sex are made the subject of comment, with a candour that in an earlier day would have been regarded as indecent and intolerable. We cannot and should not ignore these present-day attitudes when we face the question whether *Dude* and *Escapade* are obscene according to our criminal law.

Community standards must also be local. In other words, they must be Canadian. In applying the definition in the Criminal Code we must determine what is obscene by Canadian standards, regardless of attitudes which may prevail elsewhere, be they more liberal or less so."

Of the role of the judge, Dickson, J.A., in delivering the majority judgment of the Manitoba Court of Appeal in Regina v. Great West News Ltd., [1970] 4 C.C.C. 307 had this to say at 314:

"The authorities would seem to ascribe to the Judge a much more important role in the assessment of contemporary community standards than counsel for the appellants would accord him. I do not find in Brodie, or elsewhere in the Commonwealth, any majority opinion that expert evidence of community standards is an essential ingredient to a finding of guilt. If any inference can be drawn from Brodie it is that the Judge must, in the final analysis, endeavour to apply what he, in the light of his experience, regards as contemporary standards of the Canadian community. In so doing he must be at pains to avoid having his decision simply reflect or project his own notions of what is tolerable."

In the Sudbury News case Howland, C.J.O. discussed another relevant issue - the extent to which the manner and circumstances of distribution are relevant in determining if a publication is obscene. A number of cases were reviewed in which these factors were considered to be of importance in regard to the particular material under consideration. The following passages found at pages 8 and 11 of the reasons for judgment of Howland, C.J.O. are very helpful:

"The next question which arises is the extent to which the manner and circumstances of distribution are relevant in determining whether or not a publication is obscene. There are some publications which are so blatantly indecent that they

would not be tolerable by the Canadian community under any circumstances. Some pictures are offensive to the majority of people to the point that the Canadian community would not tolerate them on a billboard, or on the cover of a magazine, or on a television screen where persons of all ages and sensibilities would be exposed to them, but would be prepared to tolerate them being viewed by persons who wished to view them. Some pictures would not be acceptable by Canadian community standards in a children's bedtime storybook or primer but would be in a magazine for general distribution. The Canadian community might be prepared to tolerate the exhibition of a motion picture to an adult audience, but would consider the exhibition of the same motion picture to a general audience, which included children, to be an undue exploitation of sex. Similarly, the general distribution of certain magazines to a neighbourhood store accessible to all ages would not be tolerable, whereas the distribution of such magazines to "adult" bookstores to which children under a certain age were not admitted might not be objectionable. The packaging and pricing of a publication may also be relevant in considering whether Canadian community standards have been exceeded. The distribution of magazines in plastic covers marked "adult" in some respects might act as an attraction rather than a deterrent unless the price was high enough to place it beyond the reach of most children.

.....

Turning to the specific issue in this appeal, the question which the learned trial Judge should have determined in an objective way, after considering the relevant evidence, was whether the contemporary Canadian community would have tolerated the distribution of the magazines in question to stores which made them available to the general public. It is the standard which the Canadian community is prepared to tolerate for publications which are given general distribution that has to be determined.

This standard is not one based solely on the fact that publications will be available to children nor on the fact that they will be available to persons of advanced years who have led a sheltered life, or, on the other hand, to persons who are broad-minded and permissive. It is the standard of tolerance based on the fact that the publications will be available to the general public which includes all of those groups. It is not proper to speak of the Canadian community standard in isolation. It must be considered in relation to the manner and circumstances of distribution. However, I do not think that the manner and circumstances of public display were relevant as that is a matter entirely for the proprietors of the confectionery stores."

The latter paragraph has particular relevance to this case.

Of assistance in assessing the motion pictures in this case is the following passage from the judgment of Freedman, C.J.M., writing on behalf of the majority of the Manitoba Court of Appeal in Regina v. Odeon Morton Theatres Ltd., (1974) 16 C.C.C. (2d) 185 at 194:

"To determine whether a dominant characteristic of this film is the undue exploitation of sex we must have regard to many things - the author's artistic purpose, the manner in which he has portrayed and developed the story, his depiction and interplay of character, his creation of visual effects through skilful camera techniques, as well as other matters that might be mentioned. It is in relation to all of these that the sexual episodes must be considered. And the question here posed for us is this: Do the sexual episodes play a legitimate role in "Last Tango" when "measured by the internal necessities of the [film] itself"?: vide the Brodie case, supra, at p. 181 C.C.C. p.528 D.L.R. Or do they merely represent dirt for dirt's sake? I find assistance in supplying the answer



here by contrasting the present film with films that have been referred to in the evidence as "skin-flicks".

The basis characteristic of "skin-flicks" is that they are either wholly destitute of plot or, if they do have anything resembling a story line, it is one that is transparently thin, a palpably meagre framework on which to hang one erotic episode after another. In describing such films Father Pungente, Chairman of the Manitoba Film Classification Board, stated that they invariably show, among other depictions of sex, a scene of Lesbianism as well as the inevitable wild orgy. Anyone familiar with "skin-flicks" - either through stag movies or through certain types of commercial theatres - will be aware of something else too, namely that the sexual scenes often go beyond mere simulation. I share the view of the many qualified observers who testified for the defence that sex in "Last Tango" rests on an altogether different footing and that its role there is justified by the internal necessities of the film."

Finally, the authorities contain two statements of judicial thinking which, although written several years ago, are deserving of particular attention in light of s.2(b) of The Charter of Rights and Freedoms to which I will refer subsequently. The first statement is that of Freedman, J.A., in the Dominion News case, supra, at 117:

"I think I should add my view that in cases close to the border line, tolerance is to be preferred to proscription. To strike at a publication which is not clearly obscene may have repercussions and implications beyond what is immediately visible. To suppress the bad is one thing; to suppress the not so bad, or even the possibly good is quite another. Unless it is confined to clear cases, suppression may tend to inhibit those creative impulses and endeavours which ought to be encouraged in a free society."



The second is that of Dickson, J.A., in Regina v. Prairie Schooner News Ltd. and Powers, (1970) 1 C.C.C. (2d) 251 at 269, quoted with approval by Zuber, J.A. in the Proper case, supra at 510:

"In the Great West News case, we referred to contemporary standards of tolerance. I have no doubt, as Dr. Rich testified, and as the Judge agreed, a distinction can be made between private taste and standard of tolerance. It can hardly be questioned that many people would find personally offensive, material which they would permit others to read. Parliament, through its legislation on obscenity, could hardly have wished to proscribe as criminal that which was acceptable or tolerable according to current standards of the Canadian community."

Mr. Rosenberg has submitted that the test developed by such cases as Regina v. Brodie, supra, and Regina v. Dominion News and Gifts (1962) Ltd., supra, should be reexamined and modified in the light of s.2(b) of The Canadian Charter of Rights and Freedoms. Section 2(b) states:

"2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;"

It is submitted the establishment of a constitutional guarantee of a fundamental freedom of expression provides the justification for the creation of a new test for the determination of what is "undue exploitation" within s.159(8) of the Criminal Code. Mr. Rosenberg

argues that in assessing the standard of tolerance in the contemporary Canadian community the court must now include the "heightened respect for freedom of expression" guaranteed by the Constitution. With this I agree, although one must not lose sight of the limits upon freedom of expression which may be demonstrated pursuant to s.1 of the Charter: cf., Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, (1983) 41 O.R. (2d) 583 (Div. Ct.). However, I do not agree with Mr. Rosenberg's submission that s.2(b) has opened the way to the establishment by this court of a new test for the measurement of "undue exploitation". The test advocated by Mr. Rosenberg would require the adoption of the test developed by the Supreme Court of the United States in Miller v. California, (1973) 413 U.S. 15 and explained in such cases as United States of America v. Various Articles of Obscene Merchandise, (1983) 709 F.2d 132 (U.S. Ct. App., 2nd Cir.).

I wish to make it clear that no constitutional issues have been raised in this case. The defendants do not seek a declaration that s.159 of the Criminal Code is unconstitutional on the ground that it represents an invasion of the freedom of expression guaranteed by s.2(b) of the Charter. Nor has the prosecution asked the Court to decide the question of whether obscene materials, such as video cassette films intended for home use, should be excluded from the protection of s.2(b) in the way that the Supreme Court of the United States has excluded obscenity as

a category from the protection of the First Amendment: see, e.g., Chaplinsky v. New Hampshire, (1942) 315 U.S. 568; Roth v. United States, (1957) 354 U.S. 476. For the purposes of this case counsel are content that the issues be litigated on the assumption that obscenity is properly excluded from the protection of s.2(b) pursuant to the limits set by s.1: Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, supra. I trust that it is obvious that in proceeding in this manner I am not to be taken as expressing an opinion on whether or not obscenity should receive the absolute protection of s.2(b) free from such limits as may be demonstrated under s.1. I have not, of course, directed my attention to such questions as whether the governmental interest served by the regulation of obscenity can only be reasonable and justifiable in a free and democratic society if the harm resulting from the failure to regulate overrides the harm caused by the regulation of freedom of expression. Nor is the court required to decide whether the values served by free expression should be subordinate to the values served by censorship.

I come now to the 25 motion pictures which are the subject of this case and the determination of whether any of them unduly exploit sex or sex and violence. I have viewed 24 of the motion pictures. The film "Anna Obsessed" is the subject of both

counts in the indictment. It required 30 hours to view these films. Of the films introduced by the defence I watched "Lipstick", "Videodrome" and "Not a Love Story". I did not look at the other films tendered by the defendants as I had seen them on previous occasions. I do not intend to even attempt to describe each of the films which I watched. I do not feel that a description of every scene in each film would be helpful to any person who may read these reasons for judgment. There is no way in which I can adequately describe what I have seen, other than in a general way. For example, I do not find it possible to describe the degree of explicitness of the scenes of sexual activity and the scenes of violence and the scenes of both sex and violence exhibited in some of the films. In this regard, I find helpful the following words of Freedman, J.A., in R. v. Prairie Schooner News Ltd., supra, at 256:

"I think it fair to say that community tolerance of the printed word is greater than that of pictorial representations ... indeed it is easy to see why this should be so. A book requires some understanding and the exercise of imagination; a photograph at once tells its story to all, even to the illiterate. A book demands an expenditure of time and effort; a picture conveys its message swiftly and easily. A description in a book of an erotic scene, no matter how luridly written, still remains only a description; the same scene presented in the form of a vivid photograph instantly rivets the attention, whether its effect is to shock, stimulate or amuse. The familiar saying that one picture is worth a thousand words applies with special force in the field of obscenity."



Therefore, I will in a general way describe the 25 motion pictures. I preface my description by saying that the experience of having to watch all of the films was undoubtedly one of the less pleasant experiences of my judicial career. It brought new meaning to the phrase "cruel and unusual punishment". With the exception of "Erotic Women in Love" and "3,4,5 and More", each of the films has some sort of story line or plot. In some of the films, such as "Wanda Whips Wall Street" and "A Coming of Angels", the plot is reasonably well developed. However, such plot as there is in most of the films is banal at best and serves as the vehicle for uniting a number of scenes of sexual activities usually unrelated to one another. Examples of this type of film are "Please Mr. Postman" and "Scrabble D'Amour". Several films are poor imitations of popular motion pictures. "Blow Dry" resembles "Shampoo". "Brief Affair" has some resemblance to "Fame". "8 to 4" is "9' to 5" with scenes of explicit sex. "Summer of '72" was inspired by "Summer of '42". "Memphis Cathouse Blues" is modelled on "The Best Little Whorehouse in Texas". Most of the films could be described as soap operas with explicit scenes of sexual activities.

None of the films is a great work of art. In many of them it was difficult to detect and follow the story line. However, I found the story told by a few of them to be mildly interesting. In fairness, I must say that my interest in the



story deteriorated in direct proportion to the number of films I was required to view. Although my task does not require a critical review of the films, I am bound to say that for the most part they are insipid, dull and boring. The common denominator of the films is the artless way in which sexual intercourse is treated. Very little romanticism emanates from the scenes of sexual intercourse. Most of them reflected very little love or tenderness. For the most part the sexual scenes do not form an integral part of the plot. Rather a plot would appear to have been constructed to unite the various episodes of sex and, in some films, sex and violence. In virtually all of the films the quality of production is good. As well, the same people perform in many of the films. Obviously, there exists somewhere an adult movie industry which seems to have produced its own movie stars.

The motion pictures depict a wide range of scenes of explicit sex on the part of adults, singly, in pairs and in groups. These scenes include detailed portrayals of sexual intercourse, genitalia, masturbation, cunnilingus, fellatio, and anal intercourse. Standard fare for most of the films is at least one scene of Lesbianism and one sex orgy. The dialogue in most films is predictable and repetitive. In several films the sounds of erotic pleasure are obviously dubbed. This became apparent when I realized while watching one film that it would have been impossible for the performers to have been making the sounds attributed to

them as their mouths were so engaged as to make the uttering of any sounds impossible. Several of the films have scenes which couple violence and cruelty with sex. These scenes, such as scenes of bondage, frequently involve men perpetrating indignities on women in a sexual context. In my opinion many of the films are exploitive of women, portraying them as passive victims who derive limitless pleasure from inflicted pain and from subjugation to acts of violence, humiliation and degradation. Women are depicted as sexual objects whose only redeeming features are their genital and erotic zones which are prominently displayed in clinical detail. Whether deliberately or otherwise, most of the films portray degradation, humiliation, victimization and violence in human relationships as normal and acceptable behaviour.

I must now determine whether or not the Crown has proved that the contemporary Canadian community will not tolerate the distribution of some or all of the films. This is not an easy test to apply. As I indicated earlier the evidence of Mrs. Walker is not particularly helpful and while the evidence of Mrs. Rowlands is helpful, she was unable to state an opinion with respect to national levels of tolerance. She was able to speak only with respect to Metropolitan Toronto. While it is true that I can take into account the fact that the Ontario and Quebec censor boards approved some of the films for commercial viewing, there is no evidence of the standards used by the boards in approving a

film as there was in Regina v. McFall, (1975) 26 C.C.C. (2d) 181 (B.C.C.A.). However, it is of significance that the showing of all of the films which received censor board approval was restricted to adult or mature audiences. In the present case there are no restrictions with respect to the age of the persons to whom the video cassette tapes may be rented or sold. The films are intended to be viewed in the home. While the pictures are presumably intended for an adult audience, once in the home they are available for viewing by all persons including children. Many of the films were allowed into Canada by Customs officials as not being "of an immoral or indecent character". This is also evidence the court may consider, but there is no evidence with respect to the meaning and application of this test and it would seem that it is a somewhat different test than the one which applies to obscenity: Re Priape Enrg. et al. and The Deputy Minister of National Revenue, (1980) 52 C.C.C. (2d) 44 (Que. Sup. Ct.). I should also add that there was no evidence tendered with respect to the purpose of the author and director of each film. Thus, there is very little evidence before the court to assist it in determining what is the national level of tolerance, other than the films themselves.

As I have said, I have watched all of the 25 motion pictures. In determining whether it has been proved that a film is obscene I am mindful that my own personal tastes or prejudices must play no role. My decision must not simply reflect

or project my own notion of what the contemporary Canadian community will tolerate. I must endeavour to apply what I, in the light of my experience, regard to be the contemporary standards of the Canadian community.

However, I feel constrained, as did Hugessen, A.C.J.O., in the Priape case, to make some comment upon the test which the Court must apply. It is well established that if the material itself is introduced into evidence, expert evidence as to obscenity or community standards is not required. Indeed, even if it is presented the trier of fact is not bound to accept it. There is no necessity for the judge or jury to rely on evidence introduced in court as the basis for identifying community standards. Therefore, the trier of fact may determine for himself or herself (or themselves in cases tried by a jury) the content of the community standard which is to be applied in determining whether the material in issue exceeds that standard. It is an objective test which applies. The test is not based on the level of tolerance of the judge or the jury. It is what the judge or jury believe the national level of tolerance to be.

This is a very difficult judgment to make in a community of 24,000,000 people who inhabit the second largest country in the world consisting of 3,831,012 square miles. No doubt very different levels of tolerance exist in small communities

such as Goose Bay in Labrador, Dawson in the Yukon, and Nobleton in Ontario, and the large Metropolitan centers of Montreal, Toronto and Vancouver. As well, Canada is a pluralistic society and different parts of that society will have different points of view. Yet it remains the task of the trier of fact, who is assumed to have his finger on the "pornographic pulse" of the nation, to assess objectively whether or not the contemporary Canadian community will tolerate the distribution of the motion pictures before the Court. There is some irony to this requirement. The judge, who by the very institutional nature of his calling is required to distance himself or herself from society, for the purposes of the application of the test of obscenity is expected to be a person for all seasons familiar with and aware of the national level of tolerance. Thus the trial judge (or jury) is required to rely upon his or her own experience and decide as best he or she can what most people in Canada think about such material to arrive upon a measure of community tolerance of that material. Judges or jurors lacking experience in the field of pornography and the attitudes of others toward it face a substantial challenge in making the findings demanded by the law. I am sure that s.159(8) of the Criminal Code is unique in its delegation by Parliament to the contemporary Canadian community of its power to determine what books and motion picture should or



should not be stigmatized with the label "Criminal".

I turn now to the motion pictures. In doing so, I believe that is important in this era of constitutionally guaranteed rights and freedoms to recall the words of Freedman, J.A. that "in cases close to the border line tolerance is to be preferred to proscription". In my opinion the Crown has proved beyond a reasonable doubt that the contemporary Canadian community would not tolerate the distribution of the following motion pictures; "Anna Obsessed" (both the Ontario and Quebec versions), "A Coming of Angels", "Erotic Women in Love", "Games Women Play", "Skintight" "Summer of '72", "The Tale of Tiffany Lust", "Les Aventures Amoureuses", "Broteuses Infernales", "Jeux De Corps", and "Scrabble D'Amour". In my view, these films would even exceed the community standards of tolerance of Sodom and Gomorrah. However, I entertain a reasonable doubt that the remaining films exceed the level of community tolerance.

All of the films contain what the Crown described as "standard, run of the mill scenes" of sexual intercourse. In my opinion, contemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse. Contemporary community standards would also tolerate the distribution of films which consist of scenes of group sex, Lesbianism, fellatio, cunnilingus, and anal sex. However, films which consist substantially or partially of scenes which portray violence and cruelty in con-

junction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed exceed the level of community tolerance. Most of the films which I have found to be obscene fall into this category. As for the other films which I am satisfied are obscene and which do not contain scenes of sex and violence and cruelty, it is the degree of explicitness of the sexual acts which leads me to the conclusion that they exceed community standards. In films of this nature it is impossible to define with any precision where the line is to be drawn. To do so would be to attempt to define what may be indefinable.

As some of the obscene motion pictures are the subject of both counts in the indictment, I find the accused to be guilty as charged.

*Sigfrid Brinn, C.S.J.*

October 28 , 1983.











exèdent le seuil de tolérance de la société canadienne, particulièrement si les personnes visées font en outre l'objet d'actes dégradants. La plupart des films que j'ai jugés obscènes appartiennent à cette catégorie. Pour ce qui est des autres films que j'ai jugés obscènes, mais dans lesquels il n'y a pas d'association violence-cruauté-choses sexuelles, les actes sexuels représentés me paraissent trop explicites pour être acceptés par la société canadienne. Dans les films de cette nature, il est impossible de trancher la question sans hésitation. Le faire équivaldrait à définir l'indéfinissable.

Comme certains des films obscènes font partie des deux chefs d'accusation, je déclare les accusés coupables.

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ou non être qualifiées d'obscènes et qui entretiennent de ce fait la loi.

J'en reviens aux films qui nous intéressent. Je crois qu'il est important de rappeler, à une époque où nos droits et nos libertés sont garantis par la Constitution, les mots de Freedman, J.A: "Dans les cas limites, il faudrait préférer la tolérance à la proscription". A mes yeux, la Couronne a prouvé hors de tout doute raisonnable que la société canadienne contemporaine ne pouvait pas tolérer la distribution des films suivants: "Anna Obsessed" (dans sa version ontarienne et québécoise), "A Coming of Angels", "Erotic Women in Love", "Games Women Play", "Skintight", "Summer of '72", "The Tale of Tiffany Lust", "Les aventures amoureuses", "Brouteuses infernales", "Jeu de corps" et "Scrabble d'amour". D'après moi, ces films dépasseraient même le seuil de tolérance des habitants de Sodome et Gomorrhe. Toutefois, j'entretiens un doute raisonnable à l'égard des autres films.

Tous les films en litige comportent ce que la Couronne a appelé des scènes "classiques" de rapports sexuels. D'après moi, la société canadienne est prête à accepter la distribution de films composés en grande partie de scènes de rapports sexuels. De même, le consensus social actuel ne s'oppose sans doute pas à la distribution de films comportant des scènes de sexualité de groupe, de lesbianisme, de fellation, de cunnilingus et de sodomie. Par contre, les films composés, en tout ou en partie, de scènes dans lesquelles on associe la sexualité à la violence et à la cruauté

comme Goose Bay au Labrador, Dawson au Yukon et Nolleton en Ontario diffère de celui des résidents de grands centres urbains comme Montréal, Toronto et Vancouver. De plus, la société canadienne est pluraliste, et ses diverses composantes ont des points de vue qui diffèrent. Il n'en revient pas moins à la cour, dont on présume qu'elle a pris le "pouls pornographique" de la nation, d'évaluer objectivement si la société canadienne contemporaine est prête à accepter la distribution des films en litige. Cela a quelque chose d'ironique. En effet, le juge, par ses fonctions, doit habituellement prendre ses distances par rapport à la société; dans une affaire comme celle-ci, par contre, on attend du juge qu'il ait une connaissance intime du seuil de tolérance de la population. Le juge (ou le jury) doit donc s'appuyer sur sa propre expérience pour déterminer, au meilleur de ses connaissances, ce que la population du Canada pense du matériel en litige pour obtenir une évaluation du consensus social à son égard. Le juge ou le jury qui ne connaît pas beaucoup la pornographie et l'attitude des autres à l'égard de cette question est soumis à rude épreuve. Je suis sûr que l'article 159(8) du Code criminel est unique en ce sens que le Parlement y délègue à la société canadienne son pouvoir de déterminer les livres et les films qui doivent

sur l'idée que je me fais du seuil de tolérance de la société canadienne contemporaine. Je dois plutôt m'efforcer d'appliquer ce que je crois être, à la lumière de mon expérience, le consensus social actuel des Canadiens.

Je me sens cependant obligé, comme l'a fait Hugessen, J.C.A.O., dans l'affaire Prière, de faire quelques commentaires sur le critère que la cour doit appliquer. Il est bien établi que, si le matériel litigieux n'est pas mis en preuve, la cour n'est pas tenue d'obtenir l'avis d'experts en matière d'obscénité ou de consensus social. Et même si c'était le cas, le juge ou le jury n'aurait pas à se sentir lié à de tels témoignages pour établir une définition du consensus social. Le juge ou le jury doit donc déterminer par lui-même le contenu du consensus social qu'il doit appliquer pour déterminer si le matériel litigieux excède la norme. Le critère appliqué est donc objectif. Il n'a rien à voir sur le seuil de tolérance du juge ou des jurés. Il correspond à l'idée que se fait le juge ou le jury du seuil de tolérance de la population.

Il est très difficile de rendre un tel jugement dans une société de 24 millions d'habitants occupant un pays qui, par sa surface - 3,831,012 milles carrés - vient au deuxième rang. Il ne fait aucun doute que le seuil de tolérance de la population de petites villes



contrairement à ce qui était le cas dans l'affaire McFall (1975), 26 C.C.C. (2d) 181 (B.C.C.A.). Il est toutefois intéressant de signaler que les films approuvés par la censure ont tous été restreints à un auditoire adulte. Dans l'affaire qui nous occupe, les vidéocassettes peuvent être louées ou vendues à des personnes de tous âges. Même si ces films sont destinés à être vus à la maison et s'ils s'adressent présument à des adultes, tous sont à même de les voir, y compris les enfants. Plusieurs des films ont été admis au Canada par les représentants des douanes, ceux-ci ayant jugé qu'ils n'avaient pas "un caractère immoral ou indécent". La cour peut tenir compte de ce fait; rien, cependant, ne nous renseigne sur le sens et l'application de ce critère qui, apparemment, diffère quelque peu de celui qu'on applique à l'obscénité: cf. Priape Enr. et al. et le sous-ministre du Revenu national (1980), 52 C.C.C. (2d) 44 (Cour sup. du Québec). Je devrais également ajouter qu'on n'a apporté aucune preuve quant aux intentions de l'auteur et du réalisateur de chacun des films. Bref, les éléments de preuve fournis à la cour pour l'aider à déterminer le consensus social national sont minces; seuls les films eux-mêmes restent.

Comme je l'ai déjà dit, j'ai assisté à la projection des 25 films. Je reconnait que mes goûts et mes préjugés ne doivent pas intervenir dans le jugement que j'ai à porter sur leur caractère obscène. Ma décision ne doit pas uniquement s'appuyer

leur bouche étant beaucoup trop occupée ailleurs. Dans plusieurs films, les rapports sexuels sont mêlés de violence et de cruauté. Souvent, des femmes ligotées sont soumises par des hommes à des traitements sexuels dégradants. A mes yeux, la majorité des films exploitent la femme et la présentent comme une victime passive tirant un plaisir sans borne de la douleur et des actes de violence, d'humiliation et de dégradation dont elle fait l'objet. Les femmes sont assimilées à des objets sexuels qui n'ont d'intéressants que les zones érotiques et les organes génitaux, ceux-ci étant présentés dans les moindres détails. Que ce soit volontairement ou non, la plupart des films présentent la dégradation, l'humiliation, la victimisation et la violence dans les rapports humains comme des comportements normaux et acceptables.

Je dois maintenant déterminer si la Couronne a réussi ou non à prouver que la société canadienne contemporaine ne pouvait pas tolérer la distribution d'une partie ou de la totalité de ces films. Ce critère n'est pas facile à appliquer. Comme je l'ai déjà indiqué, le témoignage de Mme Walker n'est pas particulièrement utile, et, même si celui de Mme Rowlands l'est davantage, il ne m'informe pas sur le consensus social de l'ensemble de la nation. Mme Rowlands, en effet, n'a pu parler que du grand Toronto. Par ailleurs, même si je peux tenir compte du fait que les bureaux de censure de l'Ontario et du Québec ont approuvé certains des films, nous ne savons rien des normes qu'ils ont utilisées,

Les récits proposés a diminué en proportion directe du nombre de films visionnés. Bien qu'il ne m'appartienne pas de faire une critique des films, je me sens obligé de dire que, pour la plupart, ils sont insipides, ternes et ennuyeux. Les rapports sexuels sont toujours traités sans art, sans qu'il s'en dégage de sentiments. Dans la plupart des cas, les manifestations d'amour ou de tendresse sont inexistantes, et les scènes de sexualité ne sont pas intégrées au récit. D'ailleurs, la fonction du récit est apparemment de réunir des épisodes de sexualité et, dans certains cas, de sexualité et de violence. Du point de vue technique, les films sont presque tous de bonne qualité. Dans plusieurs cas, les mêmes acteurs s'y retrouvent. Manifestement, il existe quelque part une industrie du film pour adultes qui a produit ses propres vedettes.

Les films présentent un large éventail de scènes explicites de sexualité mettant en rapport des adultes, seuls, en couple ou en groupe. On y voit des images de rapports sexuels, d'organes génitaux, de masturbation, de cunnilingus, de fellation et de sodomie. Dans la plupart des cas, il y a au moins une scène de lesbianisme et une orgie sexuelle. Le plus souvent, le dialogue est prévisible et répétitif. Dans plusieurs cas, les sons associés au plaisir érotique sont manifestement doublés. Je m'en suis rendu compte quand j'ai observé, pendant le visionnement d'un film, qu'il aurait été impossible aux acteurs d'émettre les sons qu'on leur attribuait,

C'est pourquoi je ne décrirai ici les 25 films qu'en termes généraux. Je tiens, d'entrée de jeu, à dire que ce long visionnement a sans doute été l'une des expériences les moins agréables de ma carrière de magistrat. Il a donné une nouvelle signification à l'expression "châtiments cruels et inhabituels". Si l'on excepte "Erotic Women in Love" et "3, 4, 5 and More", les films présentent tous une forme de récit ou d'intrigue. Dans certains cas - "Wanda Whips Wall Street" et "A Coming of Angels", par exemple -, l'intrigue est assez bien développée. Dans la plupart des films, cependant, elle demeure, au mieux, banale et ne sert qu'à présenter une succession de scènes de rapports sexuels sans lien entre elles. "Please Mr. Postman" et "Scrabble d'amour" en fournissent des exemples caractéristiques. Plusieurs films ne sont que de pâles imitations de longs métrages bien connus. "Blow Dry", par exemple, s'apparente à "Shampoo". "Brief Affair" ressemble de loin à "Fame". "8 to 4" est une version de "9 to 5" à laquelle on a ajouté des scènes d'érotisme explicite. "Summer of '72" est manifestement inspiré de "Summer of '42". "Memphis Cathouse Blues", enfin, est copié de "The Best Little Whorehouse in Texas". On pourrait dire de la plupart des films qu'il s'agit de mélodrames aux scènes explicites de rapports sexuels.

Aucun des films n'a de qualités artistiques. Le plus souvent, il est difficile d'y voir un récit. Dans quelques rares cas, toutefois, l'histoire racontée m'a paru vaguement intéressante. En toute justice, je dois dire que mon intérêt pour



actes d'accusation. L'exercice m'a demandé 30 heures. Des films présentés par la défense, j'ai vu "Lipstick", "Videodrome" et "Not a Love Story" ("C'est surtout pas de l'amour"). Je n'ai pas visionné les autres films présentés par la défense puisque j'avais déjà eu l'occasion de les voir ailleurs. Je n'ai pas l'intention d'essayer de décrire chacun des films que j'ai vus. A mon avis, la description de chacune des scènes de ces films n'apporterait rien à ceux qui pourront lire un jour cet énoncé des motifs du jugement. D'ailleurs, il ne m'est pas possible de bien décrire ce que j'ai vu autrement qu'en termes généraux. Par exemple, je ne me sens pas capable de qualifier le degré de clarté des scènes d'activité sexuelle, des scènes de violence et des scènes de sexualité et de violence de certains de ces films. A cet égard, l'observation de Freedman, J.A., dans La Reine c. Prairie Schooner News Ltd. (cf. ci-dessus, p. 256), me semble particulièrement pertinente:

"Je crois qu'il est juste de dire que la société est plus tolérante à l'égard des textes imprimés qu'elle ne l'est pour l'image... et cela se comprend facilement. La lecture d'un livre suppose un effort de compréhension et un exercice d'imagination; la photographie, par contre, révèle immédiatement son contenu, même à un analphabète. Le livre suppose une dépense de temps et d'énergie; l'image livre beaucoup plus facilement son message. La description, dans un livre, d'une scène d'érotisme, fût-elle haute en couleur, demeure une description; la photographie fascine, qu'elle se propose de choquer, d'exciter ou simplement de divertir. L'adage "une image vaut mille mots" s'applique particulièrement bien au domaine de l'obscénité."



de la protection accordée par le premier amendement: cf. par exemple, Chaplinsky v. New Hampshire (1942) 315 U.S. 568 et Roth v. United States (1957) 354 U.S. 476. Dans l'affaire qui nous occupe, les parties ont demandé que la question soit étudiée dans l'hypothèse selon laquelle l'obscénité est exclue de la protection de l'article 2(b), conformément aux limites fixées par l'article 1: cf. Ontario Film and Video Appreciation Society and Ontario Board of Censors, précitée. J'espère que, en procédant de cette façon, on comprendra que je ne m'exprime pas sur la nécessité de protéger ou non l'obscénité en vertu des dispositions de l'article 2(b), sans égard aux limites raisonnables prévues par l'article 1. Par ailleurs, je ne me suis évidemment pas demandé si l'intérêt public servi par la loi sur l'obscénité n'était raisonnable et justifiable dans une société libre et démocratique que si les torts résultant de la non-application de la loi l'emportent sur les limites qu'elle impose à la liberté d'expression. De même, nous n'avons pas à décider ici si les valeurs servies par la liberté d'expression doivent être subordonnées aux valeurs servies par la censure.

Revenons maintenant aux 25 films qui nous intéressent et voyons si l'on y exploite indûment les choses sexuelles ou les choses sexuelles et la violence. J'ai ai visionné 24, le film "Anna Obsessed" figurant dans les deux

prétend que, dans son évaluation du seuil de tolérance de la société canadienne actuelle, la cour doit maintenant tenir compte des nouvelles garanties de liberté d'expression qu'offre la Constitution. Je suis d'accord avec lui; il ne faut toutefois pas perdre de vue les limites "raisonnables" et justifiables qu'impose à la liberté d'expression l'article 1 de la Charte: cf. Ontario Film and Video Appreciation Society and Ontario Board of Censors, (1983), 41 O.R. (2d) 583 (div. Ct.). Je ne suis toutefois pas d'accord avec M. Rosenberg lorsqu'il affirme que l'adoption de l'article 2(b) oblige cette cour à établir un nouveau critère d'évaluation du concept de "l'exploitation induite". Le critère qu'il défend est celui qu'a adopté la cour suprême des États-Unis dans une affaire opposant Miller v. California (1973) 413 U.S. 15 et qui est expliqué dans l'affaire United States of America v. Various Articles of Obscene Merchandise (1983) 709 F.2d 132 (U.S. Ct. App., 2nd Cir.).

J'espère que tous comprennent bien qu'aucune question d'ordre constitutionnel n'a été soulevée dans cette affaire. Les défenseurs n'ont pas cherché à faire déclarer inconstitutionnel l'article 59 du Code criminel en prétendant qu'il viole la liberté d'expression garantie par l'article 2(b) de la Charte. De même, la poursuite n'a pas demandé à la cour de décider si les publications obscènes comme les vidéocassettes destinées à être vues à la maison devaient être exclues du champ d'application de l'article 2(b), comme la Cour suprême des États-Unis a exclu l'obscénité

Le second est tiré d'un jugement du juge Dickson, J.A., dans une affaire opposant la Couronne à Prairie Schooner News Ltd. et Powers (1970), 1 C.C.C. (2d), pp. 251 à 269, citée, après approbation, par Zuber, J.A., dans l'affaire Probert précitée (p. 510) :

"Dans l'affaire Great West News, nous avons parlé de consensus social. Il ne fait aucun doute, comme l'a affirmé le docteur Rich dans son témoignage et, plus tard, le juge lui-même, qu'on peut établir une distinction entre les goûts de chacun et le consensus social. Manifestement, bien des gens jugent blessantes des choses qu'ils permettraient à d'autres de lire. Le Parlement, par sa législation sur l'obscénité, aurait difficilement pu interdire des choses que la société canadienne actuelle juge acceptables ou tolérables."

M. Rosenberg affirme que le critère énoncé dans La Reine c. Brodie (cf. ci-dessus) et La Reine c. Dominion News and Gifts (1962) Ltd. (cf. ci-dessus) devrait être réexaminé et modifié à la lumière de l'article 2(b) de la Charte canadienne des droits et libertés. L'article 2(b) s'énonce comme suit :

"2. Chacun a les libertés fondamentales suivantes :

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;"

M. Rosenberg soutient que la liberté d'expression garantie par la Constitution justifie la définition d'un nouveau critère d'appréciation du concept de "l'exploitation indue" de l'article 159(8) du Code criminel. Il

J'ai comparé ce film aux films qualifiés de "porno" par la partie publique.

La principale caractéristique des films "porno" est qu'ils sont partiellement ou entièrement dépourvus d'intrigue, ou, s'ils comportent ce qui peut s'apparenter à une intrigue, celle-ci est extrêmement pauvre et ne sert que de prétexte à une succession d'épisodes érotiques. Appelée à décrire ces films, le père Pungente, président du bureau de classement des films du Manitoba, a déclaré qu'ils comportaient invariablement une scène de lesbianisme et une orgie. Quiconque connaît bien les films dits "porno" - pour les avoir vus en privé ou dans certaines salles de cinéma - sait également que les scènes de sexualité sont souvent loin d'être simulées. Je partage l'opinion des nombreux observateurs qualifiés qui ont témoigné pour la défense selon laquelle les scènes de sexualité de "Last Tango" sont d'un ordre bien différent et qu'elles sont justifiées par la dynamique interne du film.

J'aimerais enfin citer deux exemples de raisonnements juridiques qui, même s'ils remontent à quelques années, méritent d'être signalés, particulièrement à la lumière de l'article 2(b) de la Charte canadienne des droits et libertés, à laquelle je reviendrais. Le premier est tiré du jugement de Freedman, J.A., dans l'affaire Dominion News précitée (p. 117):

"Je crois devoir ajouter que, dans les cas limites, il faudrait préférer la tolérance à la proscription. S'attaquer à une publication qui n'est pas manifestement obscène peut en effet avoir des répercussions et des conséquences plus graves qu'il n'y paraît. Il y a une différence importante entre interdire ce qui est mauvais et interdire ce qui n'est pas si mauvais, voire ce qui pourrait être bon. À moins d'être limitée aux cas patents, l'interdiction risque d'inhiber les élans et les efforts de création que toute société libre devrait encourager."



Cette norme n'est pas uniquement liée au fait que les publications en question seront offertes à des enfants, à des personnes d'âge mûr ayant mené une vie retirée ou à des personnes tolérantes, aux idées larges. Elle est davantage liée au fait que les publications seront offertes au grand public, et que celui-ci comprend des représentants de tous ces groupes. Le concept du consensus social ne doit donc pas être étudié isolément, mais en fonction du mode de distribution et des circonstances qui l'entourent. Dans l'affaire qui nous intéresse, cependant, je ne crois pas que la question du mode d'étalage des publications soit un facteur pertinent, puisque cette fonction revient entièrement aux propriétaires des magasins de détail."

Ce dernier paragraphe est à nos yeux particulièrement important.

Au moment d'évaluer les films qui nous intéressent ici, j'ai trouvé particulièrement intéressant le passage suivant du jugement du juge en chef du Manitoba; se prononçant pour la majorité de la Cour d'appel du Manitoba dans une affaire opposant la Couronne à Odeon Morton Theatres Ltd. (1974), 16 C.C.C. (2d), Freedman écrit aux pages 185 à 194:

"Pour déterminer si la caractéristique dominante de ce film est l'exploitation indue des choses sexuelles, il nous faut tenir compte de plusieurs facteurs: l'objet artistique de l'auteur, la façon dont il a campé et développé son récit, l'image qu'il donne des personnages et de leurs relations, les effets visuels qu'il a obtenus par le jeu de la caméra, etc. C'est en fonction de ces critères que les scènes de sexualité doivent être analysées. Et la question à laquelle nous devons répondre est la suivante: les épisodes de sexualité jouent-ils un rôle légitime dans "Last Tango" si "on les évalue en fonction de la dynamique interne du [film] lui-même"? - voir l'affaire Bordie précitée (C.C.C. p. 181 et D.L.R., p. 528). Ou, à l'inverse, ne présentent-elles que des obscénités pour elles-mêmes? Pour répondre à la question



société canadienne ne pourrait absolument pas tolérer. Certaines images sont si choquantes que la société canadienne ne tolérerait pas qu'on les affiche, qu'on en fasse la couverture d'un magazine ou qu'on les diffuse à la télévision où elles pourraient être vues par des personnes de tous âges et aux niveaux de sensibilité différents; la société accepterait cependant que ces images soient vues en privé par les personnes qui souhaitent les voir. D'autres images sont jugées trop blessantes pour figurer dans un livre de contes pour enfants ou un abécédaire, mais pourraient fort bien être publiées dans un magazine destiné au grand public. La société canadienne est peut-être prête à tolérer la présentation d'un film devant une salle d'adultes, mais estimerait que sa projection devant un auditoire général comprenant des enfants constituerait une exploitation induue de choses sexuelles. De même, la population ne tolérerait peut-être pas la distribution de certains magazines dans des magasins du coin accessibles à tous, mais accepterait qu'on les distribue dans des librairies "pour adultes" dont l'accès serait interdit aux enfants qui n'auraient pas atteint un certain âge. L'emballage et le prix d'une publication peuvent également intervenir dans l'analyse du principe du consensus social. Ainsi, les magazines "pour adultes" vendus sous pellicule plastique risquent davantage d'attirer l'attention, à moins que leurs prix ne les mettent hors de la portée de la plupart des enfants.

.....

Pour en revenir à la question en jeu dans cet appel, mon confrère le juge de première instance aurait dû chercher à déterminer objectivement, après avoir pris en considération les témoignages pertinents, si la société canadienne pouvait tolérer qu'on offre les magazines en question dans des magasins accessibles à tous. La question consiste en effet à déterminer le seuil de tolérance de la société canadienne contemporaine à l'égard des publications destinées au grand public.

En prononçant la décision majoritaire de la Cour d'appel du Manitoba dans l'affaire Regina c. Great West News Ltd., [1970] 4 C.C.C. 307, Monsieur le juge Dickson souligna, quant au rôle du juge, ce qui suit (page 314):

"Les autorités semblent accorder au juge un rôle beaucoup plus important que celui que voudrait lui donner la défense ici dans l'évaluation du niveau de tolérance de la communauté contemporaine. A ma connaissance, ni dans Brodie, ni ailleurs au Commonwealth, ne trouve-t-on une décision majoritaire à l'effet que le témoignage d'experts sur le niveau de tolérance d'une communauté est un élément essentiel dans la détermination de culpabilité. Si on peut déduire à cet égard quoi que ce soit de Brodie, c'est plutôt que le juge doit, en dernière analyse, s'employer à appliquer ce que, à partir de sa propre expérience, il considère comme étant le niveau de tolérance de la communauté canadienne. Et ce faisant, il doit à tout prix éviter que sa décision ne soit que le reflet ou la projection de ses propres notions du tolérable".

Dans l'affaire Sudbury News, le juge Howland, C.J.O., a discuté un autre sujet pertinent, à savoir le degré auquel la manière et les circonstances de la distribution sont pertinentes à la détermination de l'obscénité. Plusieurs décisions ont alors été analysées qui considéraient importants ces facteurs quant au matériel en cause. Les passages suivants tirés des pages 8 et 11 du jugement Howland sont très utiles:

La question suivante est de savoir à quel degré la manière et les circonstances de la distribution importent dans la détermination de l'obscénité d'une publication. Certains publications sont de caractère si nettement indécent que la

de son obscénité. Il suffit qu'une publication soit suffisamment pornographique pour qu'elle plaise à des centaines, voire des milliers, de vicieux, d'ignorants, de nafs ou même de curieux. Si nous admettons, par conséquent, que le nombre des lecteurs ne constitue pas un critère, il nous faut cependant reconnaître qu'il n'est pas tout à fait sans rapport avec la question. En effet, il peut intervenir dans l'évaluation du consensus social à cet égard. La norme sociale n'est pas fixée uniquement par ceux dont les goûts ou les intérêts nous semblent les moins raffinés. Elle ne l'est d'ailleurs pas non plus par les personnes aux goûts et à l'esprit rigides, austères, conservateurs ou puritains. Il nous faut donc trouver un critère qui nous donne une idée générale de la pensée et des sentiments du citoyen moyen. Évidemment, ces concepts sont fuyants, et la tâche n'est pas facile. Pourtant, nous devons faire l'effort si nous voulons disposer d'un critère objectif pour déterminer si une publication est obscène ou non. Autrement, nous adopterions une attitude subjective, et le jugement prononcé tiendrait pour beaucoup aux goûts et aux intérêts personnels du magistrat chargé de rendre la justice.

Le consensus retenu doit être celui de la société contemporaine: les temps changent et les idées évoluent. Par comparaison à l'époque victorienne, nous vivons dans une ère de libéralisme où l'on peut parler assez librement des choses sexuelles. La sexualité, que ce soit dans les livres ou les magazines, au cinéma, à la télévision et parfois même dans des conversations de salon, fait l'objet de commentaires qui, par leur candeur, auraient autrefois été jugés indécents et intolérables. Nous ne devons pas négliger ce fait au moment de déterminer si Duda et Escapade sont, au sens de notre droit criminel, des publications obscènes.

Le consensus social doit également avoir un caractère local. Ce doit être celui de la population canadienne. Au moment d'appliquer la définition du Code criminel, nous devons établir ce qui est obscène pour la population du Canada, sans égard à l'attitude d'autres peuples, fût-elle plus libérale ou plus conservatrice."

Ces commentaires ont été précisés quelque peu dans des décisions ultérieures. Par exemple, dans La Reine c. Popert (1981), 58 C.C.C. (2d) 505 (C.A., Ont.), Zuber, J.A., affirme, en page 508:

"À mes yeux, mon confrère le juge de première instance était dans l'erreur. Le concept du consensus social suppose l'existence de critères objectifs d'évaluation du caractère indécemment immoral d'un acte, et, même si les témoignages relatifs à la question du consensus social sont admissibles et parfois utiles, la Couronne n'est pas tenue d'en faire la preuve: cf. R. c. Prairie Schooner News Ltd. et Powers (1970), 1 C.C.C. (2d) 251, 75 W.W.R. 585, 12 Crim. L.Q. 462; R. c. Great West News Ltd., Mantell et Mitchell, [1970] 4 C.C.C. 307, 10 C.N.R.S. 42, 72 W.W.R. 354."

Voir également La Reine c. Sidey (1980), 52 C.C.C. (2d) 257 (C.A., Ont.) et La Reine c. Provincial News Co. et deux autres (1974), 20 C.C.C. (2d) pp. 129 à 137 (C.A., Alb.).

On trouve également une analyse très intéressante des facteurs susceptibles d'intervenir dans l'appréciation du consensus social dans les motifs du jugement de Freedman, J.A., dans l'affaire Dominion News précitée; en pages 116 et 117, il aborde la question de l'application du critère en question à deux magazines:

"Peut-on dire en toute justice qu'il s'agit d'une caractéristique dominante de Dude ou Escapade? J'ai étudié la question avec beaucoup d'attention. Il ne fait aucun doute que ce ne sont pas des magazines que je choiserais de lire, fût-ce à temps perdu. Cela ne les rend toutefois pas obscènes. Dans les affaires de cette nature, il faut prendre garde de ne pas ériger ses goûts personnels ou ses préjugés en principes juridiques. Même si ce n'est pas mon cas, beaucoup de gens souhaitent manifestement lire ces magazines. Je conviens évidemment du fait que la clientèle d'un magazine, par son nombre, ne nous permet pas de juger



norme appliquée doit avoir un caractère national: R. c. Cameron, [1966] 4 C.C.C. 273, [1966] 2 O.R. 777, 58 D.L.R. (2d) 486; R. c. Duthie Books Ltd., [1967] 1 C.C.C. 254, 58 D.L.R. (2d) 274, 50 C.R. 55; R. c. Ariadne Developments Ltd. et al. (1974), 19 C.C.C. (2d) pp. 49 à 59, 8 N.S.R. (2d) 560."

Bien qu'il soit question de "publication" dans l'article

159(8) et que le Code criminel ne donne pas de définition de la "publication", les tribunaux ont apparemment établi que le terme englobait les vidéocassettes et les films: cf., par exemple, La Reine c. Times Square Cinema Ltd. (1971), 4 C.C.C. (2d) 229 (C.A., Ont.); La Reine c. Odeon Morton Theatres Ltd. (1974), 16 C.C.C. (2d) 185 (C.A., Man.). Il appert donc que la "publication" au sens de l'article 159(8) ne s'applique pas uniquement aux imprimés.

Pour ce qui est de l'interprétation du "consensus social", le juge Howland (J.C.O.) affirme, en pages 7 et 8:

"... Le juge ou le jury s'appuieront sur les meilleures preuves disponibles et sur leur connaissance de la société canadienne. Leur tâche consiste à déterminer objectivement le seuil de tolérance de la société canadienne contemporaine, et non pas simplement à projeter leurs vues de ce qui est tolérable. Le témoignage d'experts pourra servir à déterminer le poids qu'on lui accordera; il faudra cependant le rejeter dans sa totalité s'il n'est pas concluant. Le témoignage d'experts peut se révéler fort précieux, surtout si le juge ou les jurés manquent de connaissances techniques, si leur compréhension et leur appréciation de l'art, par exemple, sont insuffisantes..."



Les précédents intéressants ont été donnés par la Cour suprême du Canada dans La Reine c. Brodie (1962) 132 C.C.C. 161 et La Reine c. Dominion News and Gifts (1962) Ltd., [1964] 3 C.C.C. 1, où la Cour suprême adopte les motifs donnés par Freedman, J.A., Cour d'appel du Manitoba [1963] 2 C.C.C., pp. 103 à 115. Ces affaires et d'autres ont été examinées par la Cour d'appel de l'Ontario dans La Reine c. Sudbury News Service Ltd. (1978), 39 C.C.C. (2d) 1, où le juge Howland, J.C.O., analyse, en page 6, le critère utilisé pour déterminer si la poursuite avait prouvé qu'une publication était obscène:

"Passons maintenant à la question de l'obscénité. Pour ce qui est des publications, la Cour suprême du Canada a maintenant établi dans Dechow c. La Couronne (1977), 35 C.C.C. (2d) 22, 76 D.L.R. (3d) 1 et 40 C.R.N.S. 129 que la définition de l'obscénité de l'article 159(8) du Code est exhaustive. En vertu de l'article 159(8) du Code, il ne suffit pas que la caractéristique dominante d'une publication ait été l'exploitation des choses sexuelles pour que celle-ci soit jugée obscène. L'exploitation doit avoir été "indue". Pour déterminer le caractère indu d'une exploitation des choses sexuelles, il faut déterminer si le seuil de tolérance de la société canadienne contemporaine a été dépassé."

A la page 7, le juge Howland, J.C.O., ajoute:

"Il importe de tenir compte du consensus de l'ensemble de la collectivité et non des normes d'un petit segment de la communauté comme le milieu universitaire ou un film a été projeté - R. c. Goldberg et al. (1971), 4 C.C.C. (2d) 187, [1971] 3 O.R. 323 - où la ville dans laquelle une image a été exposée: R. c. Kiverago (1973), 11 C.C.C. (2d) 463. La

Pour en revenir à la législation, les avocats des deux parties ont présenté les antécédents récents de la loi sur l'obscénité au Canada et aux États-Unis. Le point de départ est l'article 159(8) du Code criminel :

159(8) "Aux fins de la présente loi, est réputée obscène toute publication dont une caractéristique dominante est l'exploitation indue des choses sexuelles, ou de choses sexuelles et de l'un quelconque ou plusieurs des sujets suivants, savoir : le crime, l'horreur, la cruauté et la violence."

La défense a admis que la caractéristique dominante des films en cause était l'exploitation des choses sexuelles et, dans certains cas, l'exploitation de choses sexuelles et de la violence. Les parties ne s'entendent cependant pas sur le caractère "indu" de cette exploitation. L'affaire se résume donc à établir le critère qu'il faudra utiliser - ainsi que son mode d'utilisation - pour déterminer si la Couronne a prouvé hors de tout doute raisonnable que l'exploitation des choses sexuelles, avec ou sans violence, était "indue" au sens de la loi.

Il n'est pas nécessaire de revoir ici en détail l'évolution de la législation canadienne sur l'obscénité. La loi a été utilisée de façon éclairée par la Cour suprême du Canada et, sous réserve de ce que je dirai du rôle de la Charte canadienne des droits et libertés dans son application, je ne crois pas qu'il appartienne à ce tribunal de l'envisager sous un autre angle.

Au moment de préparer mon jugement, j'ai relu la transcription des témoignages. Je dois dire que j'avais été déjà très impressionné par le témoignage de Mme Rowlands et que je l'ai été encore plus après en avoir lu la transcription. J'estime que M. Greenspan l'a mal décrit en parlant de "concepts à la mode du féminisme militant". A mes yeux, Mme Rowlands a répondu aux questions de façon réfléchie et honnête, et elle n'a pas profité de l'occasion pour faire de la cour une tribune politique. Je dois avouer que la plupart de ses réponses ne m'ont pas étonné - bien que certaines m'aient surpris. D'après moi, rares sont les Canadiennes qui toléreront la distribution de films dans lesquels des traitements dégradants, au nom du féminisme, sont soumis à des traitements dégradants, au nom du féminisme militant. Il n'est pas nécessaire qu'une femme soit "féministe militante" pour s'opposer à la présentation des images contenues dans bon nombre de films devant la Cour. De même, une femme n'a pas à être "féministe militante" ou féministe tout court pour croire que la distribution de ces films va à l'encontre du consensus social actuel. Il lui suffit d'être une personne qui respecte la dignité de la vie et rejette ceux qui cherchent à la dégrader. Il est vrai que Mme Rowlands ne prétend pas représenter l'opinion de l'ensemble des Canadiens. Son témoignage n'en mérite pas moins notre attention. Il y a plus de un million de femmes dans le grand Toronto: Mme Rowlands croit être sensible au seuil de tolérance de la majorité d'entre elles.

extraits de 3 des films qui nous occupent: "Undulations", "Skintight" et "A Coming of Angels". A ses yeux, les images de sexualité, de violence et de brutalité présentées dans "Skintight" et "A Coming of Angels" ne seraient pas tolérées par la population du grand Toronto. Elle estime par contre que le film "Undulations", dont elle a dit qu'on y présentait surtout des "acrobaties sexuelles", serait toléré. Mme Rowlands a déclaré que, à son avis, la population du grand Toronto est aujourd'hui prête à tolérer les éléments suivants dans un film sur vidéocassette: scènes explicites de fellation, masturbation, rapports sexuels à deux ou plusieurs, voyeurisme et langage choquant. Elle est par contre d'avis que les éléments suivants excèderaient le seuil de tolérance de la population du grand Toronto: scènes d'hommes éjaculant sur le visage de femmes, introduction d'objets étrangers (épis de mais, etc.) dans le vagin, scènes explicites de sodomie, scènes de femmes urinant dans un pot ou d'hommes s'introduisant une bougie dans l'anus, rapports sexuels avec des femmes jouant le rôle d'adolescentes et scènes de rapports sexuels associés à des manifestations de violence et de cruauté. D'après Mme Rowlands, la majorité des femmes s'opposent à la distribution de films dans lesquels on associe la sexualité à la violence. Elle a dit que ces films nous leurrent en montrant des femmes qui tirent en même temps plaisir de la sexualité et de la violence. A ses yeux, beaucoup d'hommes partagent la même opinion.

Elle a admis que ses vues sur la pornographie avaient été influencées par "Not A Love Story" ("C'est surtout pas de l'amour") de l'Office national du film. Elle affirme par ailleurs ne pas avoir vu beaucoup de films au cinéma et estime que les décisions du bureau de censure de l'Ontario correspondent bien au consensus social actuel. A mon avis, on ne peut pas dire que le témoignage de Mme Walker représente l'opinion de la société canadienne contemporaine ou qu'il est significatif du seuil de tolérance des Canadiens. Au mieux, son témoignage reflète les vues d'une très petite partie de la société favorable à l'interdiction des films analogues aux 5 qu'elle a visionnés. Bref, le point de vue de Mme Walker est très spécifique, et je ne peux pas accorder beaucoup de poids à son témoignage.

En revanche, même si Mme Rowlands émet des opinions qui lui sont propres, je crois que ses vues se sont formées par contact avec un plus large échantillon d'opinions publiques que ce n'était le cas de Mme Walker. Evidemment, Mme Rowlands n'a pas mené d'enquêtes. Toutefois, à titre de conseiller municipal élu de la ville de Toronto et comme membre de divers comités, organismes et conseils du grand Toronto, elle a eu l'occasion de parler à une foule de gens, et elle est dans une très bonne position pour offrir son opinion sur le consensus social du grand Toronto. D'ailleurs, Mme Rowlands a clairement indiqué qu'elle ne pouvait parler que du seuil de tolérance de la population du grand Toronto. Mme Rowlands a vu des



le rejeter.

Mme Walker est enseignante. Elle travaille depuis 23 ans au service du conseil scolaire de Scarborough, qui fait partie du grand Toronto. Elle est membre de la fédération des enseignantes de l'Ontario, forte de 31,000 membres, et compte parmi les 580 déléguées de la réunion annuelle de la fédération. Elle a parrainé cet été une résolution que les déléguées ont adoptée et qui engage la fédération à s'opposer à toute forme de représentation "de femmes ou d'enfants mêlés à des activités sexuelles dégradantes ou sadiques". Mme Walker a dit qu'elle ne pouvait pas parler au nom de la fédération ou des 580 déléguées. Elle a cependant affirmé que ses échanges avec d'autres enseignants, des parents et d'autres personnes l'autorisaient à croire qu'elle pouvait exprimer le consensus social actuel. Elle a vu 5 des films déposés par la Couronne: "Skintight", "Tale of Tiffany Lust", "Anna Obsessed", "Undulations" et "Scrabble d'amour". Elle est d'avis que la société canadienne actuelle ne tolérerait pas la distribution de ces films sous forme de vidéocassettes. Pour étayer son opinion, elle a décrit avec force détail plusieurs des scènes des films en question. En contre-interrogatoire, toutefois, elle a expliqué qu'elle ne pouvait parler au nom de l'ensemble de la société canadienne puisqu'elle n'avait jamais quitté l'Ontario. Comme elle le dit elle-même, "tout ce que je sais se limite à l'Ontario". Mme Walker a admis que la distribution de ces bandes laissait vraisemblablement 70 % de la population de l'Ontario indifférente et qu'elle ne représentait pas les vues des 30 % restants.

et ont reçu l'approbation des douanes. Les autres films ont tous été achetés au Canada. Douglas Rankine, unique actionnaire et employé de la Doug Rankine Company Ltd. a visionné tous les films que sa compagnie distribue en Ontario et demandé que certains d'entre eux soient censurés avant d'être diffusés. En certaines occasions, M. Rankine a refusé de distribuer des films qui, à ses yeux, excédaient le seuil de tolérance actuel de la société.

Trois témoins à charge ont été convoqués par la Couronne. Personne n'a témoigné pour la défense. Comme le témoin Nancy Pollock a donné une interview aux media avant d'avoir terminé sa déposition, la défense a demandé qu'il ne soit pas tenu compte de son témoignage. Restent donc les témoignages de Josephine Walker et June Rowlands. M. Greenspan a demandé qu'on ne tienne pas compte de leur témoignage parce qu'elles ont utilisé la Cour comme tribune politique pour présenter ce qu'il a appelé "les concepts à la mode du féminisme militant". Il a soutenu que l'affaire ne devait pas être jugée en fonction des préceptes d'un segment donné de la société. Je suis d'accord avec lui à cet égard, mais je ne vois pas pourquoi je ne devrais pas tenir compte des témoignages de Mme Walker et Mme Rowlands. Ce qu'elles ont dit me renseigne aussi bien sur "ce qui se passe autour [de moi]", pour reprendre l'expression de M. Greenspan, que les longs métrages joints par la défense à son dossier et les preuves d'approbation de certains longs métrages par les bureaux de censure provinciaux et par Revenu Canada. Que le témoignage de Mme Walker et Mme Rowlands pèse ou non sur ma décision, cela ne veut pas dire qu'il faille

à toute personne en mesure de payer le prix de location demandé.

Pour établir le consensus social actuel, les accusés ont produit en preuve un certain nombre de longs métrages approuvés par le bureau de censure de la province de 1971 à 1983. Ce sont: "I the Jury", "Tattoo", "A Clockwork Orange", "Lipstick", "The Story of O" et "Videodrome". Ces films ont tous été présentés dans des salles de cinéma d'un bout à l'autre du pays. Le bureau de censure de l'Ontario a restreint l'admission à ces films aux personnes de 18 ans et plus. Au nombre des films des annexes "A" et "B", le bureau de la censure du Québec a accordé la même autorisation à "Games Women Play", "Skintight", "Aventures amoureuses de Monsieur O", "8 to 4", "Tara", "Scrabble d'amour", "Please Mr. Postman" et "Memphis Cathouse Blues". Les bureaux de censure n'ont approuvé certains films qu'après modification. De plus, des lettres de Revenu Canada (Douanes et Accise) montrent que les 13 films en question ont été visionnés et admis au Canada, dans la mesure où ils ne contrevenaient pas aux dispositions du poste tarifaire 99201-1 du Tarif des douanes (S.R.C. 1970, chap. C-41), qui interdit l'importation au Canada d'articles ayant "un caractère immoral ou indécent". Enfin, deux des films - "Erotic Women in Love" et "3, 4, 5 and More" sont des montages de scènes tirées de films approuvés par les douanes. Ainsi, 15 des films visés par l'acte d'accusation sont d'origine étrangère.

à l'annexe "B" de l'acte d'accusation. Les infractions auraient été commises de décembre 1982 à avril 1983. L'unique question en jeu consiste à déterminer si la poursuite a établi que les films, ou certains d'entre eux, étaient obscènes au sens des dispositions de l'article 159(8) du Code criminel.

Les faits pertinents ne sont pas contestés et ont été admis par les avocats des parties. Les accusés sont en affaires à Toronto et distribuent des vidéocassettes. Act III Video Productions Ltd. est également engagée dans la reproduction de vidéocassettes. Certaines des bandes de l'annexe "B" ont été livrées par Act III à la compagnie Montevideo Entertainment de Montréal, principal distributeur des bandes en question au Québec et dans le reste du Canada. Une bonne quantité de bandes énumérées à l'annexe "A" ont été transportées de l'entrepôt de la compagnie Act III aux locaux de la Doug Rankine, puis réexpédiées à quatre autres distributeurs. Pendant la période visée par l'acte d'accusation, la Doug Rankine a acheviné, en quantités diverses, 2,840 vidéocassettes des films de l'annexe "A" à quatre distributeurs qui alimentaient eux-mêmes de nombreux détaillants de l'Ontario. Chacune des vidéocassettes porte une photographie sexuellement provocante et une description du film. Les bandes sont mises à l'étalage de magasins de détail et se louent, en moyenne, 4\$ par jour. Elles sont offertes

COUR D'ASSISES DE PREMIERE INSTANCE DU DISTRICT  
JUDICIAIRE D'YORK

SA MAJESTÉ LA REINE

CONTRE

DOUG RANKINE COMPANY LTD.  
ET ACT III VIDEO PRODUCTIONS  
LTD.

Ont comparu: Peter DeJulio  
- pour la Couronne

E.L. Greenpan, C.R.  
et Marc Rosenberg  
- pour les accusés

Affaire entendue:

Les 12, 13 et 14 septembre  
ainsi que les 17 et 18  
octobre 1983

Jugement: 24 octobre 1983

MOTIFS DU JUGEMENT

BORINS, M.C.C.

Dans cette affaire, la Doug Rankine Company Ltd. et Act III Video Productions Ltd. sont clairement accusées d'avoir distribué des publications obscènes, à savoir les 18 films enregistrés sur vidéocassette dont la liste figure à l'annexe "A" de l'acte d'accusation. Act III Video Productions Ltd. est également accusée d'avoir distribué d'autres publications à caractère obscène, à savoir les 7 films enregistrés sur vidéocassette dont la liste figure





# APPENDICE 2 Liste partielle des magazines disponibles

Mayfair	Chunky Asses
Hustler	Sweet Ass
Bust Parade	Sweet Asses
Cheeks	T.V. Queens
Bottom	Big Bust Vixen
Fanny	Hanging Breasts
Legs and Asses	Kingsize
Legs Boobs Lingerie	Tits 4 U
Hot Legs	Tit Hangers
Standing Tall	Ass Holes
Legs Legs Legs	Leg Parade
Hot Wet Pussies	Leg Show
Hefty Mamas	Tip Top
Floppers	T.V. Treats
Erect Nipples	The Queens
Busting Out	Drag Queens
Anal Babes	T.V. Switchers
Strip Tease	Les Femmes
Crotchets	Skirts Up
Latin Babes	Tease
Ladies in Lace	T.V. Lovelies
Ass Parade	Knockers & Nipples
Split Beavers	Foxette
Shaved	Gent: Home of the D-Cups
Geisha Girls	Culb International
Melons & Mounds	Celeb
Milky	International H&E Monthly
Milk	Fiesta
T.V. Action	Adam
Naked Nymphs	Men Only
Hot Buns	Torso (pour hommes)
Eros	Mandate (pour hommes)
Skinflicks	Blueboy (pour hommes)
French Pussy	Penthouse
Female Flesh	Playboy
Baby Face	
Peach Fuzz Pussies	
Rapier	

Quelle différence y a-t-il entre la pornographie dite douce et la pornographie dite dure?

A votre avis, qui achète/loue les magazines/vidéos?

Pourquoi les gens achètent-ils ces productions?

Les vidéos font-ils concurrence aux magazines?

Quelles sont les images les plus populaires véhiculées par vos produits?

Quelle est le matériel qui se vend le mieux?

La couverture joue-t-elle un rôle important?

Que pensez-vous de l'idée de vendre des magazines sous pellicule plastique?

Faites-vous partie d'un organisme ou d'un groupe plus important?

Que pensez-vous de l'autocensure? Est-elle souhaitable? Quelle forme devrait-elle prendre?

# APPENDICE 1 Questionnaire d'interview

Répondant	Compagnie	Magazines	Vidéos	Genre	Titres
					Qui les produit (Canadiens)? D'où viennent-ils?
					Qui en assure la distribution dans le pays d'origine?
					Nombre de détaillants desservis par la maison de distribution/le répondant
					Ventes mensuelles
					& des ventes tiré de productions pour adultes
					Connaissez-vous bien la législation sur l'obscénité?
					Croyez-vous qu'elle est efficace?
					Est-elle appliquée uniformément?
					Comment vous accommodez-vous de la loi?
					Que désigne pour vous le "consensus social"?
					Est-il logique que la loi soit fondée sur le concept du consensus social?
					La loi a-t-elle un impact sur vos activités (sur ce que vous distribuez, sur votre clientèle)?
					Avez-vous déjà fait l'objet d'une descente, de poursuites?
					Quels sont vos rapports avec les douanes?
					Quelles modifications aimeriez-vous voir apporter à la loi?
					Le classement par la censure des vidéos destinés à la consommation privée est-il inévitable? souhaitable?
					Quelle forme pourrait-on et devrait-on lui donner?
					Accepteriez-vous de payer le bureau de censure pour qu'il visionne et classe vos produits?
					Votre travail a-t-il un caractère pornographique?
					Comment définissez-vous la pornographie?
					Deviendrait-elle être définie?

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- Bierbaum, Tom, "VCR boom continues unabated", Variety, 20:3:39, 30 avril 1984.
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- Clark, Lerenne M.G., "Liberalism and Pornography", Pornography and Censorship, édité par David Copp et Susan Wendell, New York: Prometheus Books, 1983.
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- Ellis, John, "Photography/Pornography/Art/Pornography", Screen, 21:1, printemps 1980.
- English, Deirdre, Amber Hollibaugh et Gayle Rubin, "Talking Sex: A conversation on Sexuality and Feminism", Socialist Review, 58, 11:4, juillet-août 1981.
- Garry, Ann, "Pornography and Respect for Women", Pornography and Censorship, édité par David Copp et Susan Wendell, New York: Prometheus Books, 1983.
- Hall, Dennis R., "A Note on Erotic Imagination: Hustler as a Secondary Carrier of Working Class Consciousness", Journal of Popular Culture, 15:4, printemps 1982.
- Jaehne, Karen, "Confessions of a Porn Programmer", Film Quarterly, 37:1, automne 1983.

20. Thelma McCormack, "Censorship and 'Community Standards' in Canada", Communications in Canadian Society, édité par B.D. Singer, Don Mills, Ontario: Addison-Wesley, 1983, pp. 218-219.
21. Borins, op. cit., 28-29.
22. Les vitrines des sex-shops que j'ai visités étaient généralement obstruées par un rideau; de plus, l'entrée est réservée aux personnes de 18 ans et plus, et celles-ci doivent souvent payer un prix d'admission qui est déduit de leurs achats.
23. Elite, Honey, Fox et Manhattan étaient autrefois publiés au Canada, par un Canadien, David Wells. Son ancien distributeur m'a cependant dit que ces publications n'étaient pas rentables. Le mensuel Elite était tiré à 50,000 exemplaires.
24. Dennis R. Hall, "A Note on Erotic Imagination: Hustler as a Secondary Carrier of Working Class Consciousness", Journal of Popular Culture, 15:4, printemps 1982.
25. En réaction à un article selon lequel le président d'Expo 86 a quitté la présidence de sa compagnie de distribution de magazines pour adultes (et peut-être de matériel pornographique) après qu'on l'ait accusé de ne pas être un homme d'affaires respectable, un répondant a déclaré qu'une telle attitude lui répugnait. Il s'inquiète de la réputation de son commerce et n'y voit aucun mal. Cf. "Expo '86 head hit for porn links", The Ottawa Citizen, 4 avril 1984.
26. Gerald Benjamin, "Presentation to the Special Committee on Pornography and Prostitution", 6 avril 1984.
27. Ellen Willis, "Nature's Revenge", The New York Times Book Review, 12 juillet 1981.
28. Richard Dyer, "Don't Look Now", Screen, 23:3/4, septembre-octobre 1982.
29. Gregg Blachford, "Looking at pornography", Screen Education, 29, hiver 1978-79.
30. Angela Carter, The Sadeian Woman, Londres: Virago, 1979.

10. Ellis, op. cit.
11. Riddington, op. cit.; Wendell, op. cit.
12. Les citations sont tirées de conversations avec des distributeurs de vidéos et de magazines pour adultes. Pour identifier les distributeurs, j'ai indiqué leur province d'activité (Q. ou O.) et leur domaine de spécialisation (vidéo = a., adultes; a./f., adultes/films; magazines = a., adultes; a./a., adultes/autres).
13. Bryan Johnson, "The Porno Scene: is it unreal?", The Globe and Mail, 20 août 1983; Bryan Johnson, "So where is all that Porn?", The Globe and Mail, 28 avril 1984.
14. Brenda Zosky Proulx, "Video Porn: Where do we draw the Line?", The Montreal Gazette, 2 juin 1984.
15. Karen Jaehne, "Confessions of a Feminist Porn Programmer", Film Quarterly, 37:1, automne 1983, p. 15.
16. Une étude de l'ONF a montré que les personnes qui louent des vidéocassettes de tous genres ont de 18 à 35 ans. "Les membres de clubs vidéo du Québec", Colette Noisieux, Office national du film du Canada, septembre 1983.
17. En octobre 1983, le juge Stephen Borins du district judiciaire d'York a reconnu la Doug Rankine Company et Act III Video Productions coupables d'obscénité; certains des vidéos saisis contenaient des scènes "de dégradation, d'humiliation, de victimisation et de violence assimilées à un comportement normal et acceptable". Les scènes de rapports sexuellement explicites ont toutefois été jugées acceptables.
18. Dans son jugement, Stephen Borins a observé que huit des dix-huit films confisqués avaient été approuvés par la censure ontarienne, et que treize d'entre eux avaient été vus par les douanes et ne contrevenaient pas à la Loi sur les douanes, qui interdit l'importation au Canada d'articles ayant "un caractère immoral ou indécent".
19. Zuhair Kashmeri, "Obscenity probe turns up video piracy", The Globe and Mail, 6 juin 1984.

1. John Ellis, "Photography/Pornography/Art/Pornography", Screen, 21:1, printemps 1980.
2. Ellis, op. cit., 84.
3. Ellis, op. cit., 90.
4. Ellis, op. cit., 84.
5. Jillian Riddington, document de travail sur la pornographie préparé pour le Comité national d'action sur le statut de la femme, mars 1983, p. 4; voir également Laura Lederer (éd.), Take Back the Night, New York: William Morrow and Company, 1980; Lorenne M.G. Clark, "Liberalism and Pornography", Pornography and Censorship, édité par David Copp et Susan Wendell, New York: Prometheus Books, 1983; voir également les articles de Ann Garry et Susan Wendell dans le même volume.
6. "Certaines féministes de peuvent pas admettre le moindre écart sexuel". Deirdre English, Amber Hollibaugh, Gayle Rubin, "Talking Sex: A Conversation on Sexuality and Feminism", Socialist Review, no 58, 11:4, juillet-août 1981, p. 43. Pajakowska affirme que la convergence des positions de la droite et des féministes sur la pornographie soulève un problème politique. On accorde ainsi involontairement de l'importance à certaines pratiques sexuelles dans la mesure où elles "coïncident" avec une "relation chargée de sens et non violente". Cet ensemble d'hypothèses confirme la marginalité du sadomasochisme, du transvestisme, du lesbianisme et de la pédophilie, de l'homosexualité, du lesbianisme et de la prostitution". "Imagistic Representation and the Status of the Image in Pornography", Cine-Tracts, 3:3, automne 1980, p. 13.
7. Ros Coward, Yve Lomax et Kathy Myers, "Beyond the Fragments", Camerawork, novembre 1982.
8. Varda Burstyn, "Pornography and Eroticism", Fuse, 6:1/2, mai/juin 1982.
9. Thelma McCormack, "Understanding Pornography", Canadian Woman Studies, 4:4, été/août 1983.

1. Zuhair Kashmeri, "Officials say criminals control sex industry", The Globe and Mail, 9 février 1984; Bryan Johnson, "The Porno Scene: is it unreal?", The Globe and Mail, 20 août 1983.



Notes - Introduction

1. Les Whittington, "Video pornography difficult to curb",  
The Ottawa Citizen, 26 novembre 1983; Tom Bierbaum, "VCR  
boom continues unabated", Variety, 203:39, 30 avril 1984.

et les buts qu'elle sert. La pornographie et le matériel sexuellement explicite doivent être compris dans un contexte historique. Blachford soutient que la prolifération des productions sexuellement explicites coïncide avec le développement de la vie privée et l'isolement de la sexualité dans une sphère distincte de la vie de chacun. Les productions qui en résultent témoignent de nos fantasmes et sont forgées par des valeurs idéologiques qui n'ont rien d'aléatoires<sup>29</sup>. En ce sens, le discours sur la pornographie et le matériel pour adultes coïncide avec d'autres discours sur la sexualité. Le discours pornographique, monopole de connaissance, attribue un caractère naturel à la sexualité et donne un caractère sexuel à la nature, mais dans le cadre des connaissances accessibles à ses consommateurs. Le problème tient peut-être alors davantage à la coïncidence du pouvoir et de la phallocratie qu'à la représentation de la sexualité. Pour Carter, la pornographie n'incite pas à la sexualité; au contraire, elle désamorce un potentiel d'expression en le gardant à sa place, à l'extérieur du cadre des rapports sexuels quotidiens: elle suscite le désir sans jamais l'assouvir<sup>30</sup>. Resterait donc à érotiser l'expression de tous les rapports humains, non pas seulement leur aspect visuel. En ce sens, il importe davantage de remplacer la production actuelle que de la gommer.

Les photos les plus choquantes sont celles qui offrent une vilaine image de "la femme de tous les jours", de "la voisine d'en face". Elles sont trop réelles. Les femmes représentées (cf. Club International, Gent: Home of the D Cups, disponibles en Ontario) ont souvent les cheveux sales, les ongles mal peints et les bas filés. Elles sont photographiées dans un cadre moins opulent. Les photos sont de piètre qualité, l'éclairage est mauvais et les retouches sont évidentes. La féminité des modèles n'est pas sans défaut: l'image de l'innocent "modèle de perfection" a disparu. Les publications érotiques (lire plus "raffinées"), par contre, sont jugées inoffensives. Les modèles ont atteint un statut de perfection physique que seuls les mieux nantis peuvent espérer. On accepte la femme d'élite, insaisissable et sans imperfection, mais on rejette sa pâle imitation de la classe ouvrière.

La demande de vidéos et de magazines sexuellement explicites est un phénomène masculin. Dans les films "ordinaires", on ne voit pas de scènes de rapports sexuels entre homosexuels: les érections, pénétrations et éjaculations que cela supposerait demeurent tabous, en Ontario à tout le moins. Les distributeurs répugnent tous à la perspective de ces productions: elles s'adressent uniquement aux hommes. Mais qu'en est-il des désirs des femmes? Cette question en soulève bien d'autres sur les phénomènes qui expliquent l'asymétrie des représentations sexuelles

veut soutenir que l'utilisation d'une image à des fins de  
 gratification sexuelle suppose un esprit sadique, l'image  
 elle-même peut fort bien être "objectivement"  
 inoffensive. Et que dire de la cryptopornographie de  
 certains romans à l'eau de rose? L'attrait qu'ils  
 exercent a lui aussi des racines sadomasochistes, et,  
 tout comme le magazine Hustler apprend aux hommes à agir  
 en violeurs, ces romans montrent aux femmes à agir en  
 victimes. Essentiellement, les romans à l'eau de rose  
 véhiculent l'expression d'une sexualité réprimée et  
 romancée, alors que la pornographie dure est clairement  
 lubrique et axée sur les organes génitaux.<sup>27</sup>

Willis attire par ailleurs notre attention sur un autre  
 aspect du débat. Elle explique en effet que l'imagerie  
 visuelle est généralement jugée plus subversive que l'imagerie  
 écrite. Le débat se trouve donc faussé du fait qu'on  
 privilégie une forme d'expression sexuelle, un genre par  
 rapport à un autre. On peut par ailleurs dire que le "débat  
 sur la pornographie" oppose ceux pour qui l'image et la réalité  
 convergent, et ceux qui établissent une distinction entre la  
 violence faite aux femmes et sa représentation. Bien qu'il ne  
 soit pas possible de trancher la question ici, nous pouvons  
 affirmer qu'il existe d'autres modèles (socialisation, autres  
 formes de représentation) et que l'expression sexuelle peut  
 prendre bien des aspects: la violence n'est que l'un d'eux et,  
 qui plus est, elle ne se borne pas à des représentations  
 visuelles. Manifestement, le problème est d'ordre politique,  
 et les conditions qui expliquent l'asymétrie de nos  
 représentations de la sexualité et l'association du pouvoir  
 mâle au phallus devront être étudiées plus à fond<sup>28</sup>.

La distinction qui est faite, dans le langage populaire,  
 entre la pornographie et l'érotisme soulève d'autres questions.

Les distributeurs sont également conscients des effets bénéfiques pour leur commerce de l'attention et de la publicité dont ils font l'objet chaque fois que les media, les groupes de pression ou les mouvements religieux parlent d'eux. Ils ont pour ainsi dire intérêt à garder ouvert le débat sur la moralité de la pornographie pour profiter de l'intérêt et de l'accroissement subséquent de la demande qui en découlent.

Par ailleurs, les distributeurs affirment qu'ils ont le droit de voir ce qu'ils veulent et énoncent du même coup ce qu'ils censureraient. En d'autres termes, ils aimeraient priver d'autres personnes des privilèges qu'ils s'accordent à eux-mêmes. Ce faisant, ils abaissent involontairement le débat à un niveau antisocial et individuel, la définition ultime de la pornographie ou du matériel pour adultes revenant à un individu acheteur, et non à une collectivité critique.

Le discours théorique et le discours social sur la problématique sexuelle présentent des divergences. On y établit en effet une nette distinction entre l'image pornographique (souvent associée au sadisme) et les représentations explicites de la sexualité (dont on dit qu'elles sont inoffensives ou même qu'elles ont une valeur éducative - les illustrations d'un manuel de médecine, par exemple). Ainsi, ceux qui s'opposent à la pornographie ne dénoncent pas tant les choses montrées que la façon dont elles le sont. Willis, par exemple, écrit:

L'illusion consiste à croire que l'éventail des images pornographiques virtuelles - c'est-à-dire des images principalement conçues pour susciter des désirs sexuels - n'est limité que par l'imagination de l'utilisateur. Même si l'on



une femme, ça va bien; si vous lui caressez les seins avant de la décapiter, c'est obscène". A simplement vouloir définir la pornographie, on constate que la société est divisée à ce sujet et on perçoit aisément le caractère fluctuant du consensus social.

On pourrait également décider de mettre en vente le matériel pour adultes et le matériel pornographique de manière à tracer une ligne de démarcation claire entre les deux marchés et à éviter les mises en contact accidentielles. La question de l'autocensure a été soulevée et rapidement esquivée par les répondants. Les distributeurs ont carrément affirmé qu'ils ne se faisaient pas mutuellement confiance et qu'ils préféreraient laisser la décision finale aux autorités. A titre de gens d'affaires, ils ne cherchent pas à enfreindre activement la loi et espèrent plutôt que l'Etat fixe des normes claires et les applique avec uniformité.

Le débat qui entoure la question de la présentation de la chose sexuelle au public n'est pas exempt de contradictions. Le discours que tiennent les distributeurs en fournit un exemple. Le paradoxe le plus évident oppose le sens moral des répondants et la nécessité, pour eux, de faire de bonnes affaires. Rares sont les répondants qui abandonneraient la distribution de produits qu'ils jugent eux-mêmes blessants s'ils étaient assurés de leur rentabilité. Les distributeurs préfèrent donc adopter une attitude de neutralité dans les débats sur la valeur morale de la pornographie et du matériel pour adultes.

involontairement par des grossistes parmi les milliers de périodiques ou de livres vendus par nos membres<sup>26</sup>.

En d'autres termes, le réseau légal de distribution de ce type de matériel n'est pas développé. Toutefois, écarter le problème de cette façon revient à dire: "seulement 100 femmes sont décédées des suites d'un choc toxique". L'observation n'en signifie pas moins deux choses: ce matériel est intrinsèquement néfaste, et sa production est très vraisemblablement clandestine (elle échappe donc à la censure et à d'autres restrictions légales).

La législation sur l'obscénité n'est pas appliquée avec uniformité partout. Ainsi, ce qui est jugé acceptable au Québec ne l'est pas toujours en Ontario. De même, la loi n'est pas interprétée et appliquée avec uniformité. Les autorités chargées de la mettre en application ont peine à en donner une définition précise; il en va de même des distributeurs, qui doivent exercer leur activité dans des limites imprécises. Il pourrait donc être utile, tant conceptuellement que juridiquement, d'établir une distinction entre le matériel pour adultes et la pornographie (enfants, bestialité et violence) de façon à bien cerner l'objet de ce "débat sur la pornographie". Reste cependant le problème de la violence dans d'autres contextes. Pour certains, la violence sexuelle serait plus obscène que d'autres formes de violence. La mutilation des organes génitaux serait plus choquante que, disons, l'amputation d'un membre à la scie. A l'heure actuelle, seul le premier de ces deux exemples est jugé obscène. Ainsi que l'observe un distributeur de vidéos: "si vous décapitez

Les pages qui précèdent donnent vraisemblablement une image du distributeur type et des pratiques de distribution courantes de matériel pour adultes. Dans les faits, la distribution de magazines et de vidéos pour adultes présente, en gros, les caractéristiques suivantes. Selon toute apparence, le matériel généralement disponible n'est pas le même au Québec qu'en Ontario. Il semble en effet que les magazines, les vidéos et les films 35 mm distribués au Québec ont un caractère sexuel plus explicite; en d'autres termes, ils dépeignent des rapports sexuels "réels". Par contraste, les représentations offertes aux Ontariens sont des simulations; la pénétration, par exemple, y reste tabou. Apparemment, le matériel qui comporte des représentations de violence, de pornographie mettant en cause des enfants ou de bestialité a une origine clandestine. Reste à savoir si cette situation est néfaste ou non. A l'heure actuelle, le "problème" ne semble pas très grave. Dans le mémoire qu'il a soumis au Comité spécial sur la pornographie et la prostitution, le président de Benjamin News, Gerald Benjamin, écrit:

Les membres du PDC ne distribuent pas sciemment de pornographie dure ou de matériel obscène... cela ne veut pas dire, toutefois, que du matériel ne puisse pas échapper à la surveillance des douanes et du comité consultatif ou être glissé

ont une idée de ce que la société canadienne est prête à tolérer, mais qu'ils hésitent à l'admettre. Par ailleurs, ils n'envisagent pas de bon coeur l'imposition de restrictions et, comme gens d'affaires, ils estiment que l'adoption d'autres mesures (évaluation du consensus social, barrières douanières) risque de leur faire perdre du temps et même de l'argent. S'il existe un marché, la plupart voudront l'exploiter, quelles que soient leurs préoccupations morales ou celles des autres<sup>25</sup>.

#### Changements souhaités

Les répondants réclament tous l'établissement de directives claires, l'adoption d'une norme qu'on appliquerait avec uniformité. Aucun d'eux ne voit l'intérêt d'offrir aux Canadiens des images de bestialité, de violence ou de pornographie mettant en cause des enfants. Tous s'inquiètent de ce que des magazines puissent être saisis après avoir été acceptés par les douanes. A leurs yeux, il s'agit là d'une manifestation d'hypocrisie. A cette fin, ils font deux suggestions: qu'on retire du Code criminel la définition de l'obscénité et qu'on crée un bureau central chargé d'accepter les publications entrant au Canada et dont les décisions seraient finales.

"Je crois qu'il existe une majorité silencieuse qui tolère l'érotisme explicite." [O.a.]

"Je ne sais plus au juste ce qu'est un consensus social." [O.a./a.]

Le répondant qui s'exprime ainsi suppose qu'il est théoriquement impossible de donner une définition conceptuelle du consensus social. Pourtant, les distributeurs sont tous capables de décrire ce que les Canadiens sont prêts à tolérer. Ils craignent d'avantage que la décision du consensus social soit laissée à un organisme arbitrairement formé ou au bon vouloir d'un individu.

Sont jugées inacceptables la violence (ligotage et représentations sadomasochistes), la pornographie mettant en cause des enfants et la bestialité. Les distributeurs estiment par ailleurs que la société est prête à tolérer et qu'elle souhaite même obtenir des représentations "de rapports sexuels normaux", de la fellation, du cunnilingus et des relations homosexuelles. Le répondant du Québec affirme que les magazines les plus explicites offrant même des représentations des tabous sexuels sont souvent disponibles en milieu rural, les descentes y étant rares.

On pourrait dire que les distributeurs savent qu'il y a un consensus social (fut-il variable), mais qu'ils n'en admettent pas les conséquences. Par exemple, un répondant a dit qu'il était en faveur du règlement qui fixe la hauteur d'étalage des magazines pour adultes; il affirme également avoir suggéré à ses éditeurs d'adoucir la couverture des magazines destinés au marché canadien. On peut en déduire que les distributeurs



un professeur de droit et un éditeur) : il est reconnu par le procureur général de la province et informe les grossistes sur l'évolution du consensus social. Le comité n'a que des pouvoirs consultatifs. Un autre répondant de l'Ontario s'est fait saisir des magazines qui avaient déjà été acceptés par les douanes. Il affirme "je pourrais aussi bien vendre des magazines clandestins si ceux que les douanes ont acceptés sont jugés illégaux".

#### Douanes

Tous les répondants affirment que leurs magazines sont passés par les douanes et ne montrent des lettres qui confirment leurs dires. Apparemment, c'est souvent au distributeur qu'il revient de faire approuver une publication par les douanes. Après que les douanes aient fait leurs recommandations, le magazine est renvoyé à l'éditeur, qui en fait une version "adoucie" pour le marché canadien. Souvent, des photographies grand format jugées violentes (cuir, etc.) sont supprimées; de même, les images de pénétration peuvent être en partie masquées.

Un distributeur ontarien nous a fait remarquer que, suite au jugement Borins sur la distribution de vidéos, les douanes s'étaient mises "à la recherche" des manifestations de violence dans les dessins ou les légendes.

## Connaissance de la législation sur l'obscénité

Comme les distributeurs de vidéos, les distributeurs de magazines ne s'intéressent à la loi que dans la mesure où elle les touche directement. Deux d'entre eux en connaissaient le libellé. Tous affirment que, dans les faits, l'interprétation de la loi est fonction du point de vue des personnes ou des organismes chargés de l'appliquer. En Ontario, cela signifie que la violence et les manifestations de cruauté envers les femmes sont interdites (tout comme, d'ailleurs, les représentations le moins explicitement explicites). Nous avons par ailleurs appris que, à Toronto, la police municipale entretenait autrefois des "relations de travail" avec les détaillants et leur demandait, avant de faire une descente, de retirer le matériel "obsène" de leurs étagères. Aujourd'hui, apparemment, les descentes se font sans avertissement.

Le répondant du Québec croit que les douanes ont établi une "liste" de ce qui est acceptable, mais estime également que l'interprétation de la liste est laissée à chacun.

"Sur papier, rien n'est permis... dans les faits, tout dépend qui décide." [Q.a./o.]

## Conséquences de la législation

A une exception près, les répondants ont tous fait l'objet d'une descente. Tous se plaignent des vicissitudes de l'interprétation de la loi et, comme les distributeurs de vidéos, ils jouent avec ce qu'ils estiment acceptable. L'un des distributeurs ontariens soumet ses publications à un comité consultatif (l'Ontario Advisory Committee). L'OAC est formé de trois professionnels (un psychologue,

On pourrait donc dire que les magazines qui jouissent d'une meilleure réputation (Penthouse et Playboy, par exemple) s'adressent à des hommes dont les choix de consommation sont carrément ceux de la classe moyenne ou de la classe supérieure, si on en juge par les articles et la publicité - automobiles, chaînes stéréophoniques, appareils photographiques et autres articles de luxe - qu'on y trouve. Ils offrent également des articles sur la politique ou susceptibles d'intéresser les intellectuels. A l'inverse, Hall soutient que Hustler agit comme un "véhicule de la conscience de la classe ouvrière". Par sa politique rédactionnelle (août 1977: "...Hustler offre à l'Américain moyen ce que celui-ci cherchait dans une publication, mais n'a jamais pu obtenir, et présente l'information dans des termes intelligibles... le magazine Hustler est devenu la voix des laissés pour compte") et son "non-conformisme d'un goût douteux", Hustler discrédite l'ordre établi, les institutions et les représentants du pouvoir, mais en des termes hautement individualistes. Le lecteur - loyal, selon Hall - peut garder une attitude de défi critique à l'égard du système, mais, contrairement à la personne de classe moyenne qui lit Playboy, ses pouvoirs ne s'étendent pas au-delà de lui-même<sup>24</sup>. Il est intéressant d'observer que certains opposants estiment que Penthouse et Playboy (et d'autres magazines du même acabit) sont acceptables, peu intéressants, mais inoffensifs, alors que les magazines qui s'adressent à l'homme moyen (à la classe ouvrière) seraient néfastes. A nos yeux, toutefois, le biais culturel de leur argumentation leur échappe.

Il joue un double rôle : elle empêche les enfants de parcourir les revues et elle oblige le consommateur à prendre immédiatement une décision - acheter ou ne pas acheter. Dans les deux cas, les affaires des distributeurs ne s'en portent que mieux.

Deux autres facteurs favorisent la vente des magazines pornographiques : les protestations de ceux qui s'opposent à la pornographie, par l'intérêt et la curiosité qu'elles suscitent, et les règlements municipaux aux termes desquels les magazines doivent être placés à au moins cinq pieds du sol (autrefois, les magazines qui n'étaient pas mis à l'étalage demeureraient discrètement dans des boîtes posées au sol).

Les distributeurs sont généralement d'avis que les magazines pour adultes comblent un besoin et remplissent une fonction sociale essentielle.

"Ils servent d'exutoire aux fantasmes." [O.a./a.]

"Tout le monde aime le sexe." [O.a.]

"Nous avons maintenant l'habitude de voir des corps de femme." [O.a.]

Bref, les distributeurs ne pensent pas que les magazines pour adultes vont disparaître bientôt.

Le consommateur

On estime généralement que le consommateur de magazines pour adultes est de sexe masculin. Comme pour la vidéo, toutefois, les distributeurs s'inquiètent peu de la composition de leur clientèle. Ils sont plus intéressés à savoir si les magazines se vendent qu'à expliquer pourquoi. Certains répondants se sont empressés de dire que les enfants n'achetaient pas leurs magazines. Un distributeur de magazines ne comportant pas de pornographie dite dure estime que sa clientèle est formée de "personnes à revenu élevé, aux goûts raffinés". Apparemment, on pourrait donc classer les magazines pour adultes en fonction du milieu ou du mode de vie des personnes qui les achètent.



Le distributeur du Québec que nous avons interrogé a déclaré que s'il y avait de la "violence" dans les magazines pour adultes offerts au Québec, elle était "habillée" (femmes vêtues de cuir, souvent représentées un fouet à la main).

Les répondants affirment tous ignorer l'existence d'images de bestialité ou de pornographie mettant en cause des enfants; certains pensent néanmoins qu'il pourrait y avoir un marché clandestin pour ces productions.

Ce qui se vend

Le marché des magazines suscite une vive concurrence; plusieurs magazines disparaissent d'ailleurs après la publication d'un premier numéro. Le facteur qui détermine invariablement la popularité d'un magazine est la présentation de sa couverture, et les distributeurs doivent déployer des efforts considérables pour accrocher l'attention du client. Ils ne savent s'ils ont réussi qu'en présence des résultats. Le succès d'une photo tient probablement à la fois aux photographes, aux modèles et aux éditeurs. Un distributeur affirme que les magazines de femmes aux gros seins se vendent bien. D'autres magazines s'adressent à une clientèle plus spécialisée. Certains, par exemple, ne présentent que des images de sodomie; d'autres présentent des jeunes filles (dont on dit toujours qu'elles auraient plus de 18 ans) se livrant à la masturbation.

La couverture joue un rôle important. Il en va de même de la pellicule plastique qui gaine les magazines les plus "piquants", ceux qui n'offrent presque exclusivement que des images, et peu d'articles, de récits ou de publicité (Penthouse, Playboy, Hustler, Mayfair, par exemple, n'appartiennent pas à cette catégorie). La pellicule plastique



recueillis par des revendeurs, vendus à nouveau aux distributeurs et offerts au public, à prix réduit, en groupe de deux ou trois. Un distributeur ontarien offre également par la poste, surtout à des clients de l'Ontario, des vidéocassettes 8 mm sans son qu'il obtient d'un distributeur de vidéos (que j'ai d'ailleurs interviewé et selon lequel tout ce qu'il offre a été approuvé par le bureau de censure). Les autres magazines offerts viennent des États-Unis et, plus rarement, d'Europe<sup>23</sup>.

Les répondants distribuent leurs magazines dans tout le pays, mais surtout en Ontario et au Québec; certains font affaires avec 35 détaillants, et d'autres, avec 70. Le seul distributeur qui a dévoilé son chiffre d'affaires mensuel s'évalue à 15,000\$. Les autres ignorent la proportion de leurs ventes représentée par les magazines pour adultes ou, s'ils revendaient des invendus, ils ont déclaré que les chiffres changeaient tous les mois en fonction des disponibilités.

Production disponible

En Ontario, les hommes et les femmes photographiés peuvent être entièrement nus et simuler des rapports hétéro ou homosexuels; aux dires d'un répondant, les représentations d'érections ne sont tolérées que depuis six ans. Les représentations de pénétration, d'éjaculation et d'organes génitaux féminins sont interdites. Un distributeur ontarien offrait auparavant des magazines représentant des femmes ligotées et battues par des hommes; depuis que la cour l'a condamné, il a abandonné cette pratique. Au Québec, on trouve des photos explicites de rapports sexuels, de fellation, de sodomie, de relations sexuelles entre lesbiennes et homosexuels et d'éjaculation.

explicites de rapports sexuels, des gros plans de pénétration ou de fellation. Ces magazines sont généralement disponibles dans les sex-shops du Québec<sup>22</sup>. Dans les kiosques ordinaires, les magazines les plus "piquants" qui semblent contenir des photos explicites (à en juger par la couverture et le titre) sont vendus sous pellicule plastique rendant toute lecture sur place impossible. Dans un magasin de Montréal, j'ai pu voir un magazine dont la couverture présentait une femme ligotée.

En Ontario, les magazines présentent généralement une pornographie "douce", et notamment des images de rapports sexuels simulés (sans vues de pénétration, par exemple) ou des photographies dans lesquelles certains éléments (les organes génitaux, par exemple) sont masqués par des carrés noirs. Sont également rangés dans cette catégorie les magazines qui publient des articles "dérégulés". Dans un magasin pour adultes de la rue Yonge à Toronto, j'ai découvert deux magazines cachés derrière une pile de revues "inoffensives" et qui présentaient des images de pornographie manifestement "dure"; dans une descente, la police les aurait sûrement confisqués. Dans les bureaux du projet "P", on m'a montré des magazines "obscènes" contenant des images de femmes ligotées ou de femmes vêtues de cuir qui, le plus souvent, brandissaient un fouet.

Notre échantillon comportait quatre distributeurs. L'un d'eux offrait une trentaine de magazines et vendait environ quarante livres par mois, tous pour adultes. Le stock d'un autre était composé, pour moitié, de matériel pour adultes. Le troisième n'offrait à sa clientèle qu'une quinzaine de magazines sur 260. Le dernier, enfin, est le représentant au Canada de l'éditeur d'un magazine pour adultes du Royaume-Uni. Deux des répondants agissaient comme distributeurs indépendants de magazines invendus,

DISTRIBUTION DE MAGAZINES : PORNOGRAPHIE ?

Les distributeurs de magazines sont partagés sur le caractère pornographique de leurs produits. Tous commencent par dire "non". A leurs yeux, la pornographie a un caractère explicite (images sans équivoque de rapports sexuels), elle associe la violence à la dégradation sexuelle, elle met en scène des enfants, des animaux ou "des manifestations inhabituelles de la sexualité... des couples engagés dans des rapports sexuels communs, par exemple". Ici encore, il a été difficile de définir la pornographie. Pour un répondant, "chacun a sa propre définition de la pornographie". Deux distributeurs ont cependant exprimé clairement leur pensée et répondu que tout ce qu'ils offraient avaient un caractère pornographique. Leur réponse colle bien à la définition qu'en donne le dictionnaire Oxford : description ou manifestation explicite de l'activité sexuelle dans la littérature... conçue pour agir davantage sur l'érotisme que sur les sentiments esthétiques (du grec porné "prostituée" et graphein "écrire"). Les deux répondants en question ont raffiné leur définition en observant que la violence et la pornographie mettaient en cause des enfants étaient simplement deux formes de cette "pornographie" (et qu'elles devraient être interdites) et que la pornographie désigne simplement l'exploitation des choses sexuelles (ils ne l'ont toutefois pas qualifiée d'indue).

De façon générale, les distributeurs préfèrent parler de "magazines pour adultes" ou de "revues spécialisées pour hommes". Comme les distributeurs de vidéos, ils utilisent le terme "pornographie" pour désigner des images qu'ils n'offrent pas à leur clientèle et qu'ils jugent eux-mêmes "obscènes". Tous évitent de reconnaître les connotations négatives du terme.

Les magazines de pornographie dure sont ceux qui présentent des photographies



qu'on crée des sections spéciales "pour adultes" dans les magasins. D'autres encore préconisent l'attribution de permis aux propriétaires de magasins et la suppression de représentations sur les vidéocassettes susceptibles d'influencer les enfants. Certains ont observé que, d'un point de vue strictement commercial, le classement des vidéos présente des inconvénients. En effet, les compagnies-mères américaines publient des dates de diffusion des vidéos; elles stimulent ainsi les ventes, car les nouvelles productions ne cessent de sortir. En imposant un classement des films, on reculerait vraisemblablement les dates de diffusion, et le chiffre d'affaires s'en ressentirait.



Les bureaux de censure eux-mêmes n'appliquent pas avec uniformité la législation sur l'obscénité, que les décisions sont fonction des personnes qui les prennent et que la définition de l'obscénité ne peut pas reposer sur des critères objectifs.

## Classement

La majorité des répondants s'accordent pour dire que les vidéos destinées à être vus à la maison devraient faire l'objet d'une forme de classement. Ceux qui s'opposent à cette idée invoquent la différence qu'il y a entre un visionnement public et un visionnement privé. Ils assimilent la location et le visionnement à la maison d'un vidéo à une affaire privée relevant de la responsabilité des parents, ceux-ci ayant à "censurer" ce que leurs enfants peuvent ou ne peuvent pas voir. L'un des répondants préconise un classement auquel seuls participeraient des représentants de l'industrie.

Bon nombre des répondants ont suggéré que le système de classement actuellement appliqué aux films projetés en public le soit également aux vidéos destinées au visionnement privé. Ici encore, ils espèrent vivement qu'on établira une norme nationale dont l'application sera laissée aux autorités locales. Pour l'un des distributeurs, les collectivités ne savent pas trop ce qui est illégal et ce qui ne l'est pas.

Certains distributeurs ont fait des suggestions plus précises à l'égard de la réglementation de la location des vidéos. L'un d'eux souhaite par exemple que le classement des films soit laissé aux producteurs. De façon générale, les distributeurs sont en faveur de l'imposition d'une limite d'âge (18 ans et plus) et aimeraient

vraisemblablement un "terrain glissant", qu'ils établissent un rapport entre le fait de voir de telles images et le désir de les reproduire. C'est pourquoi ils souhaitent qu'on impose des restrictions susceptibles d'éviter toute dépravation. Ils soutiennent cependant que les productions actuellement disponibles sont parfaitement inoffensives, et que les personnes qu'elles pourraient influencer ont des prédispositions ou sont déjà dépravées.

"Il est préférable que les gens expriment leurs fantasmes par le cinéma... ceux qui donnent forme à des fantasmes de violence ne sont pas sains d'esprit." [Ö.a./f.]

"Ceux qui distribuent ces films n'ont pas de sens moral... je ne crois toutefois pas qu'il y en ait ici." [Ö.a./f.]

"Il n'est pas normal qu'une personne aime en voir une autre attachée, battue et violée. Les films d'horreur, par contre, sont formidables (ils sont d'ailleurs très populaires et rapportent beaucoup)." [Ö.a./f.]

"La censure est absolument nécessaire... personne n'aime la bestialité, la pornographie mettant en cause des enfants ou la violence. A mes yeux, le viol n'a rien d'érotique. Mais quand la violence devient-elle excessive? Comment peut-on trancher une telle question?" [Ö.a./f.]

"Tout ce qui ne porte pas à la violence n'enfreint pas les droits des autres." [Ö.a.]

Outre qu'ils souhaitent que la loi et la définition de l'obscénité et de la violence soient clarifiées, les distributeurs sont irrités par l'incohérence des accusations d'obscénité. Ainsi, les vidéocassettes confisquées à l'occasion de descentes - généralement par les autorités municipales - le sont souvent après avoir été approuvées par le bureau de censure ou les douanes (comme le souligne d'ailleurs le juge Borins). La loi est donc interprétée librement et sans uniformité, souvent selon le bon plaisir d'un agent de police ou d'un juge. Les distributeurs soutiennent également que

Les répondants s'entendent tous pour dire que les vidéos destinées à être vus à la maison ont un caractère strictement privé ("chacun est maître chez soi", affirme l'un d'eux) et qu'ils relèvent du choix personnel. Le caractère privé du visionnement est dans ce cas le critère important.

"Dans une société libre, vous ne pouvez pas interdire à un adulte de voir ce qui l'intéresse. Nous n'obligeons pas le public à acheter les films pour adultes, et pourtant, la demande est forte." [O.a.]

Deux distributeurs estiment que l'obscénité ne devrait pas être définie dans le Code criminel. La plupart des autres souhaitent qu'on redéfinisse le concept avec précision et la pornographie mettant en cause des enfants. L'un des distributeurs aimerait qu'on établisse une distinction entre la sexualité et la violence dans le libellé actuel de la loi. Tous souhaitent vivement qu'on adopte une définition pour tout le pays et qu'on l'applique uniformément.

Certains répondants espèrent que les vidéos américaines non censurées offrant des images des trois domaines tabous (ou des scènes de sexualité "à la suédoise" plus longues et sans récit) demeureront interdits au Canada, de crainte qu'ils n'envahissent le marché. Ces nouveaux produits plus explicites contribueraient à stimuler les ventes et la concurrence, mais également à faire chuter les prix. Les affaires pourraient en souffrir.

On peut déduire des commentaires sur la nature des représentations de la violence que les distributeurs y voient

composés en grande partie de scènes de rapports sexuels. De même, le consensus social actuel ne s'oppose sans doute pas à la distribution de films comportant des scènes de sexualité de groupe, de lesbianisme, de fellation, de cunnilingus et de sodomie. Par contre, les films composés, en tout ou en partie, de scènes dans lesquelles on associe la sexualité à la violence et à la cruauté exèdent le seuil de tolérance de la société canadienne, particulièrement si les personnes visées font en outre l'objet d'actes dégradants.

D'autres, enfin, affirment que les Canadiens sont prêts à presque tout tolérer pourvu qu'ils sachent à quoi s'en tenir.

## Changements souhaités

Deux répondants affirment pouvoir "s'accomoder de la loi", dans la mesure où les recettes qu'ils tirent d'autres longs métrages assurent le succès de leur entreprise.

Il y a par ailleurs des contradictions dans les propos tenus par les distributeurs qui souhaitent voir modifier les dispositions de la législation relatives à leur activité. Par exemple, ils posent le dilemme des libertés civiles en affirmant que certaines images sont moralement répréhensibles ou "dégoûtantes". Ainsi, ils professent d'une part la liberté de choix, mais veulent faire interdire les "indésirables" (la pornographie mettant en cause des enfants, la bestialité et la violence).

"Je ne suis pas en faveur de la distribution de pornographie dure, mais j'ai des problèmes avec la censure." [O.a.]

Quiconque souhaite voir ce genre de film est qualifié de "malade" et ne devrait pas jouir des droits qu'on accorde aux autres. En termes plus philosophiques, les distributeurs veulent voir ce qui les intéresse (et ils sont prêts à étendre ce "droit" aux autres); concrètement, toutefois, ils aimeraient qu'on définissent plus clairement ce qui est autorisé et ce qui ne l'est pas.



Les distributeurs préfèrent parler de la société canadienne dans son ensemble parce qu'ils croient d'une part que le consensus social ne varie pas et parce qu'ils estiment d'autre part, comme l'a dit un répondant de l'Ontario, que leur "droit" ou leur désir de voir ce qu'ils veulent est violé. D'un point de vue strictement commercial, l'absence de consensus social suppose qu'on consacre beaucoup d'énergie et de temps à jeter sur le marché plusieurs versions d'un même produit pour satisfaire des marchés prétendument différents.

Les distributeurs savent parfaitement bien ce que les Canadiens sont prêts à tolérer. Tous souhaitent que la norme québécoise soit acceptée et universellement reconnue. Ils estiment par ailleurs que les opinions des individus et des groupes diffèrent et que certains utilisent le concept du consensus social pour se cacher, moraliser ou entamer des poursuites en justice. Les distributeurs n'en pensent pas moins que le public devrait s'autocensurer. Seuls trois sujets font exception et correspondent d'ailleurs à la demande du public: la pornographie mettant en scène des enfants, la violence ou la violence "excessive" (viols, mutilations à caractère sexuel) et la bestialité. Les distributeurs du Québec et de l'Ontario sont d'avis que les images actuellement disponibles au Québec - érotisme explicite, fellation, sodomie, relations à plusieurs partenaires, lesbianisme - sont maintenant acceptées par tous les Canadiens. Pour une distributeur québécois, "les gens ne sont plus choqués par ce qu'ils voient dans les magasins aujourd'hui". Ce sentiment est partagé par le juge Stephen Borins, dans un jugement de la cour du district d'York:

D'après moi, la société canadienne est prête à accepter la distribution de films



d'entre eux s'opposent à l'inclusion du concept du consensus social dans une définition juridique de l'obscénité.

Aucune des personnes interviewées n'a pu donner une définition, fut-elle sommaire, du consensus social. On en a simplement dit qu'il correspondait à "ce que les gens d'ici veulent" ou "au genre de vie que les gens veulent se donner". De même, personne n'a pu dire si la norme variait d'une région à l'autre, d'une province à l'autre. Presque tous reconnaissent, en théorie que "le consensus social" diffère de ce que les autorités policières locales ou les bureaux de censure, et non la collectivité, tolèrent, qu'il est dicté par les autorités ou les petits groupes qui savent se faire entendre. Pour certains, enfin, le consensus social est une chose individuelle, "chacun a le sien".

En revanche, lorsqu'on parle concrètement du consensus social, les choses changent un peu. Trois répondants affirment que le consensus est fonction des ventes. Pour l'un d'eux, le concept du consensus social "fait de certains d'entre nous des citoyens de seconde classe... le consensus social devrait être défini en fonction de ce qui semble acceptable au public qui paie pour voir (le film)". [O.a.] En d'autres termes, il faudrait laisser les produits "atteindre les marchés auxquels ils sont destinés". [O.a./f.]

soit avant, soit après les avoir censurés. De même, les distributeurs du Québec censurent les vidéos destinées au marché ontarien. Apparemment, certains vidéos peuvent avoir été approuvés par les douanes et la censure et circuler dans une version intégrale ou qui comporte des scènes jugées obscènes par certaines autorités locales. En effet, aucune province (si ce n'est, bientôt, l'Ontario) ne s'est donné de loi sur la question du visionnement des vidéos en privé. Les bandes destinées à ce marché n'ont donc pas à être approuvées par les douanes ou la censure. Par ailleurs, les distributeurs peuvent garder pendant 60 jours les films 35 mm avant de les soumettre à la censure. Pendant ce délai, ils ont le loisir d'en faire des copies et de les distribuer sous la forme de leur choix (en version intégrale ou non).

#### Consensus social

Dans le Code criminel, l'obscénité désigne "l'exploitation indu de choses sexuelles", le terme "indue" signifiant "contraire au consensus social". Pour McCormack, la loi est biaisée: elle n'est presque exclusivement appliquée qu'à la pornographie et aux films pour adultes.

Dans une société où l'immense majorité de la population ne s'intéresse pas aux livres, aux pièces ou aux oeuvres qui constituent une réelle forme d'art érotique, toute distinction fondée sur l'esthétique a un caractère discriminatoire. En d'autres termes, il y a, ici comme ailleurs, une loi pour les riches et une pour les pauvres, et une manifestation additionnelle de discrimination à l'égard des perversions sexuelles: une loi pour les gens normaux et une autre pour les déviants.<sup>20</sup>

Les distributeurs estiment eux aussi pouvoir juger de l'état de la société en fonction des demandes qui leur sont adressées. La majorité

s'inquiètent également de ce que des concurrents viennent éventuellement occuper le marché avec de nouveaux produits. Un distributeur québécois (qui offrait plus de longs métrages courants que de films pour adultes) s'est plaint de l'insécurité que cette situation engendrait. Après que des films saisis à l'occasion d'une descente lui aient été retournés pour des raisons d'ordre technique associées à la rédaction du mandat, il a cessé d'offrir à sa clientèle des vidéos pour adultes, alors que ses concurrents ont continué de le faire impunément. Il perdait donc de l'argent, et ses affaires en souffraient.

Deux distributeurs du Québec ont abordé le problème de la piraterie. De petites maisons et des particuliers utilisant leur automobile comme point de vente offrent des vidéos qui ne sont pas passées par la douane. Ils ne possèdent pas de droits d'auteur et ne paient donc pas de redevances. Leurs bandes se vendent à faible prix. Les distributeurs fondés en droit perdent donc une partie de leurs affaires. La piraterie est cependant extrêmement difficile à mettre au jour. L'auteur d'un article récent du Globe and Mail affirme qu'un réseau de piraterie a fait perdre une dizaine de millions de dollars à l'industrie cinématographique<sup>19</sup>.

## Douanes

Il est généralement admis que bon nombre de bandes originales ne sont pas visionnées par les douanes. Aux dires de l'un des distributeurs, "les douanes, c'est de la rigolade". Un autre répondant affirme que les douanes acceptent automatiquement certains films parce qu'elles n'ont pas les moyens, le personnel ou le temps de tout voir. Certains distributeurs envoient leurs vidéos à la censure

## Conséquences de la législation

Les distributeurs de vidéos s'arrangent pour exercer leur activité dans les limites de restrictions légales plutôt vagues. En Ontario, par exemple, les vidéos et les films destinés aux salles de cinéma doivent tous être approuvés par le bureau de censure; certains distributeurs font cependant leur propre censure "dans l'espoir que le film sera intégralement accepté par le bureau de censure". Sont interdits: la "violence excessive à l'égard des femmes" (le viol et les autres formes de violence ou de mutilation, par exemple), les érections, les pénétrations, les contacts génitaux ou bucco-génitaux, les plans prolongés, les mouvements du bassin et les actes de profanation.

Au Québec, la situation est la même: certaines "bandes originales" (elles arrivent habituellement des États-Unis) sont envoyées au bureau de censure avant ou après avoir été épurées par le distributeur. Les autres sont épurées, puis distribuées. Seul un faible pourcentage n'est pas censuré. Le principal problème des répondants (tant au Québec qu'en Ontario) vient de l'absence de normes à la fois cohérentes et concrètes. De plus, la politique des autorités diverge: la police peut saisir des films que la censure ou les douanes ont approuvés<sup>18</sup>. En revanche, les distributeurs s'entendent presque tous sur les productions qu'ils jugent indésirables: la pornographie mettant en cause des enfants, la violence et la bestialité. A cet égard, les distributeurs québécois exercent une forme d'autocensure et s'entendent tacitement pour ne pas offrir ce genre de film. La plupart estiment que ces productions ont un caractère immoral, mais



ont une connaissance des aspects de la loi qui les touchent directement.

L'imprécision de leur compréhension de la loi sur

l'obscénité tient au manque de clarté de l'application même de la loi. Deux distributeurs québécois n'offrant presque

exclusivement que des vidéos pour adultes connaissaient la loi "en gros", n'étaient pas en mesure de la commenter, mais

savaient ce qui est "clairement" interdit: la violence, la

pornographie mettant en cause des enfants et la bestialité.

D'autres distributeurs ne semblent pas savoir au juste ce qui est et n'est pas acceptable et reconnaissent que "les choses

dépendent beaucoup de la façon dont on les interprète". Tous

reconnaissent que la question tourne autour du concept de

"l'exploitation sexuelle", mais que "la définition (de

l'obscénité) demeure obscure". En Ontario, les restrictions

des douanes et du bureau de censure sont plus sévères, et toute image explicite est jugée obscène. C'est pourquoi les films en

"version ontarienne" sont débarassés des images d'érection, de

pénétration, d'éjaculation, de masturbation et de violence;

"évidemment, la présence d'animaux ou d'enfants n'est pas

tolérée". Un distributeur a affirmé avec emphase que "rien de

dégradant" n'était autorisé.

"Une personne ne peut pas en avilir une autre pour sa seule satisfaction." [O.a.]



Nous sommes opprimés... Les gens n'ont pas assez sexe dont ils ont ou croient avoir besoin." [O.a.]

Les vidéos sont perçus comme une fantaisie, une fuite et comme ne devant pas être pris au sérieux. La plupart des distributeurs admettent que leurs produits sont "ennuyants", bêtes et stupides":

"Je ne crois pas que la sexualité soit un spectacle... ces films sont des ordures." [O.a./f.]

"Le cinéma c'est l'imaginaire; certains voient du mal partout; les protestations des féministes ne sont pas représentatives; les couples veulent voir ces films à la maison pour les regarder seuls." [O.a./f.]

#### Connaissance de la législation sur l'obscénité

Les établissements dirigés par la plupart des répondants ont tous fait l'objet d'au moins une descente. Certaines des personnes interviewées font actuellement l'objet de poursuites judiciaires. La plupart, cependant, connaissent mal la législation sur l'obscénité. Trois d'entre elles connaissent le jugement Borins et s'en servaient comme guide<sup>17</sup>. A nos yeux, ce manque de connaissance des distributeurs et leur apparente complaisance tirent vraisemblablement leur origine de deux phénomènes. D'une part, les distributeurs résistent bien aux conséquences des descentes: la demande est toujours bonne, la diminution des affaires n'est que temporaire et les amendes sont "négligeables". D'autre part, comme la loi n'est pas uniformément appliquée (nous y reviendrons dans la section intitulée "Changements souhaités"), la plupart des répondants y voient une affaire d'interprétation et, dans la mesure où ils ne croient pas enfreindre la loi, ils ne savent pas comment l'interpréter.

Ceux qui étaient au courant de la législation (les trois seuls qui distribuaient uniquement des vidéos pour adultes) connaissaient bien les expressions "exploitation induite" et "consensus social". Tous les distributeurs

Le consommateur

La plupart des distributeurs ne rencontrent pas directement la clientèle mais ils présument que le client typique est un homme âgé de 18 à 45 ans.16 On reconnaît aussi que quelques femmes louent des vidéos devant le fait qu'il est moins embarrassant de le visionner à la maison qu'un cinéma. L'un des répondants a indiqué que, selon lui les femmes louent des vidéos seulement pour "enregistrer leur choc".

En réfléchissant sur les raisons pour lesquelles il y a une demande de films adultes, les répondants référaient invariablement au consommateur mâle (le pronom "il" était utilisé et/ou en décrivant le consommateur typique les répondants extrapolaient souvent à partir de leurs propres expériences ou desirs pour en former des généralisation).

"Le public est un monde de croyants...ils pensent qu'il y a de bons et de mauvais films de sexe et ils gobent tout - ils continuent à chercher les bons"[Q.a./f.]

Les raisons de la demande sont vues en termes naturaliste et à historiques. Ainsi on prétend que la sexualité et le plaisir sexuel sont naturel et naturellement important pour tout le monde; que les vidéos représentent le désir sexuel; et que, le sexe étant un domaine encore tabou dans notre société, chacun est en quête du "fruit défendu".

Comme l'a affirmé un répondant, "il y a un marché pour tout". Ainsi, la sexualité se vend bien, mais les films n'ont pas tous la même popularité. Leur succès tient presque invariablement à l'apparence de la vidéocassette. Le conditionnement de l'imagerie sexuelle joue à cet égard un rôle aussi important que le nom des vedettes associées à un film. Un distributeur signale que les vedettes ne font souvent que figurer dans les films; un autre observe que "les bons films ne sont pas nécessairement ceux qui se vendent le mieux". La demande semble liée à deux autres facteurs. L'apposition sur une vidéocassette des trois X révèleurs lui assure une grande popularité pendant sa durée de diffusion (qu'on estime à environ six mois). Le deuxième facteur qui stimule généralement les affaires et la faveur que connaît tel ou tel film est la publicité que lui donnent les protestations (des féministes, par exemple) et les accusations d'obscénité. Certains ont également observé que les femmes constituaient progressivement un auditoire qui réclame des films avec un récit et des scènes de sexualité adaptées à leurs goûts. Dans "Confessions of a Feminist Porn Programmer", Karen Jaehne écrit:

On a observé que le développement de l'imaginaire et la diminution de la brutalité dans les films pour adultes étaient directement liés à l'expansion du public de sexe féminin. Les enquêtes menées auprès de notre clientèle nous ont permis de constater que plus de 60 % de nos auditeurs étaient des femmes; de plus, nous savons que le canal Playboy est en train d'adapter ses émissions et sa programmation aux exigences d'un auditoire qui serait principalement formé de femmes.

de clients "malades"13.

Certains répondants affirment avoir vu des films "pour hommes" comportant des scènes de bestialité entre des femmes et des animaux; ces films peuvent être obtenus par la poste, des États-Unis. Une commis de bureau qui avait entendu quelques bribes d'une interview a affirmé connaître un détaillant de Scarborough qui offrait clandestinement des films "de bêtes". Certains répondants ont refusé d'admettre l'existence de ce type de pornographie; d'autres ont dit savoir que de tels films pouvaient être obtenus sous le manteau. Apparemment, ces productions s'adressent à une minorité suspecte.

Ce qui se vend

Le marché des vidéos semble fort lucratif. Pour les distributeurs, il est défini d'avance: "tout ce qui comporte du sexe se vend". (Les distributeurs savent également et ont affirmé que la violence se vend bien: témoin la popularité de films comme "Vendredi 13" et "Halloween".) On nous a affirmé à quelques reprises que la plupart de ceux qui viennent de s'acheter un magnétoscope mettaient dans leur première location un film pour adultes14.

"Ce qui se vend... les films XXX de bonne qualité avec beaucoup de sexe et un peu d'histoire." [0.a./f.]

"Les gens veulent voir ce qu'ils ne peuvent pas voir... pour défier les autorités... et (au sujet de la violence) ils aiment qu'on leur fasse peur." [0.a./f.]

"Ils aimeraient que la voisine soit une mauvaise fille; ils doivent chercher une certaine vérité: pourquoi reviendraient-ils sans cesse?" [0.a./f.]



L'image est masquée de façon que seul le visage des acteurs paraisse à l'écran. La pornographie dite "dure" est généralement celle qu'on offre au Québec: scènes de rapports sexuels, fellation, sodomie et éjaculation. Les productions "non censurées" (qu'un seul des répondants admet avoir mis en circulation, après avoir coupé les scènes de viol) désignent le matériel produit aux États-Unis susceptible de se distinguer de son équivalent "classique" à deux égards: elles peuvent comporter des scènes de violence (des viols, par exemple), et la durée des scènes de rapports sexuels est parfois plus longue que dans la version québécoise.

Mes contacts avec les vidéos comportant des scènes de violence se sont limités au visionnement de parties de vidéos confisquées par des membres du projet "P" et que distribuait l'un des répondants (il a d'ailleurs affirmé n'en rien connaître puisqu'il ne faisait pas partie de l'entreprise quand les vidéos en question étaient en circulation). Les scènes que j'ai vues provenaient de deux vidéos. On pourrait dire qu'elles comportaient des images de violence simulée dont certaines avaient un caractère sexuel. Le spectateur assiste par exemple au viol, hors champ, d'une femme dont on n'entend que les cris et, plus tard, à la "vengeance" de la femme, qui hache les organes génitaux de son assaillant - seules des images de sang en témoignent. Dans le second film, les jambes d'une femme sont sciées. On m'a signalé que ces films étaient régulièrement confisqués et que les distributeurs s'entendent pour poursuivre. La police et les distributeurs s'entendent pour dire que la pornographie mettant en scène des enfants n'est disponible que sous le manteau - et non dans les magasins habituels - et qu'elle s'adresse à une minorité



Les maisons de distribution qui n'offrent que des films pour adultes ont un chiffre d'affaires mensuel moyen d'environ 180,000\$. N'était-ce des films pour adultes, elles fermentaient vraisemblablement leurs portes. Les établissements qui offrent à la fois des films courants et des films pour adultes - ceux-ci représentant de 1% à 25% de leur stock - tirent de la distribution de vidéos pour adultes des recettes mensuelles de 1,000\$ à 70,000\$. Certains répondants ont signalé qu'ils devaient offrir des vidéos pour adultes pour obtenir des films courants, les grossistes auxquels ils s'adressent les obligeant à cette pratique.

Production disponible

L'application des termes "douce" et "dure" à la pornographie appelle un autre commentaire. La pornographie dite "douce" est généralement celle qu'on présente en Ontario; l'activité sexuelle y est simulée ou supposée: tout est laissé à l'imagination. Le spectateur peut voir des caresses, mais jamais d'organes génitaux ou de contacts génitaux directs (pénétration, masturbation, fellation). Les scènes plus explicites sont coupées ou cachées:

comportent "l'avilissement de la femme", des scènes de violence envers les femmes ou de sadomasochisme, la mise en scène d'enfants, des images de bestialité et diverses autres choses qu'un distributeur a jugé "dégoûtantes" - ses exemples ont été la flagellation et la défécation.

Nous grouperons donc les productions généralement disponibles sous les vocables "divertissements pour adultes" ou "magazines/vidéos pour adultes".

## Le commerce

La plupart des distributeurs de vidéos sont en affaires depuis un à six ans. La majorité exercent leur activité depuis environ trois ans; le record est de sept. Un répondant de l'Ontario a commencé à distribuer des longs métrages aux salles de cinéma il y a quatorze ans. Bien qu'il n'y ait apparemment pas de vidéos pour adultes réalisées au Canada, certains distributeurs (sept de ceux que nous avons interrogés) parlent de "produire" des vidéos. Ils entendent par là l'acquisition des droits sur certains films et leur reproduction. C'est uniquement dans ce sens qu'on peut dire que les vidéos offerts sur le marché sont produits ici. La majorité des vidéos pour adultes ont à l'origine été produits pour être présentés en salle (35 mm) et viennent de New York et de Californie - la plupart des répondants n'ont pas voulu nous donner le nom de leurs distributeurs américains.

de conséquences sociales et morales, et ils assimilent la pornographie, d'un point de vue conceptuel, à "une chose personnelle".

"Personne, aujourd'hui, ne peut définir la pornographie."<sup>12</sup> [Q.a.]

"Donnez-moi une définition de ce qui est dégradant. A quoi cela correspond-il au juste?" [O.a.]

"La pornographie... des images de la sexualité, mais de bon goût... tout dépend de la définition de chacun." [Q.a./f.]

A un extrême, un répondant a même déclaré: "la pornographie, c'est tout ce qui me choque". Sur le plan descriptif, la plupart des distributeurs de l'Ontario - où la censure et la police donnent de l'obscurité une interprétation beaucoup plus serrée qu'au Québec - estiment que la pornographie correspond au champ qu'ils ne peuvent pas couvrir: gros plans des parties génitales, images de rapports sexuels, pénétration, masturbation, éjaculation, sodomie, fellation et autres représentations explicites ne laissant rien à l'imagination. Pour un distributeur ontarien, sont pornographiques les productions où il y a bestialité, mise en scène d'enfants (ou d'adultes jouant le rôle d'enfants) ou mutilation.

"La pornographie, c'est la représentation de rapports sexuels, d'animaux, d'enfants, de scènes de violence - ce n'est pas normal." [O.a./f.]

"...tout ce que les organismes de réglementation jugent inacceptable... la dégradation du corps humain - généralement celui des femmes... mais c'est une affaire personnelle." [O.a./f.]

"...pénétration, sodomie, fellation, présentation des parties génitales en gros plan." [O.a./f.]

Au Québec, par contre, on est plus explicite. Les représentations pornographiques sont donc celles qui

qu'ils offrent à leur clientèle sont produits par des "adultes" responsables pour être vus par des "adultes" responsables. En ce sens, les distributeurs présumant qu'ils comblent un besoin réel (dont la nature sera étudiée plus loin).

Chaque fois qu'ils ont à dire s'ils estiment que leur travail a un caractère pornographique, les distributeurs de vidéos/de films répondent par la négative. Par contraste, ils utilisent abondamment le terme "pornographie" et l'appliquent peut-être implicitement à leur travail. Par exemple, nous avons souvent relevé des phrases comme: "quand je suis entré dans le commerce de la pornographie..." ou "il y aura toujours une demande pour la pornographie...". Historiquement et dans son sens courant, le terme s'applique à des représentations des choses sexuelles. Il est répandu dans le public et, de ce fait, chez les distributeurs. D'où son attrait et son accessibilité. Certains, toutefois, tentent de raffiner leur utilisation du mot (et aboutissent à une définition qui, curieusement, s'apparente à celle qu'utilisent les féministes) 11. Conscients du débat public sur la question, ne serait-ce qu'au niveau des media, et sensibles au caractère délicat des problèmes en jeu, les distributeurs se servent explicitement du terme "pornographie" pour désigner des productions qu'ils jugent généralement indésirables ou offensantes. En ce sens, ils interviennent dans le débat sur le caractère moral de leur activité sans toutefois s'engager. Certains reconnaissent qu'il est difficile de définir un terme aussi ambigu et pourtant lourd

et leur lutte consiste à faire "légitimer" leur activité et à lui donner un sens de la manière la moins dissimulée possible - à leurs yeux, tout au moins. Ils ont des préoccupations d'ordre moral, mais également un sens aigu des affaires qui les pousse à la recherche du bénéfice, sans égard à leurs goûts personnels. Plusieurs d'entre eux ont affirmé qu'ils ne voulaient pas enfreindre la loi, qu'ils se préoccupaient de leur réputation, tant dans leur milieu qu'au sein de leur famille, particulièrement après une descente à laquelle les journaux font écho et qui fait parler la famille et les enfants. Ils reconnaissent également que le débat dont leur commerce fait l'objet mousse leurs affaires, que "l'illégalité" de leur commerce est souvent rentable.

Les distributeurs établissent une distinction entre la "pornographie" et les "divertissements pour adultes" (certains distributeurs de magazines qualifient de revues "spécialisées" pour hommes les publications qui contiennent des gros plans de rapports sexuels) non seulement à des fins descriptives - c'est-à-dire pour comparer qualitativement le contenu d'un long métrage ou d'un vidéo destiné à être vu en privé, par exemple -, mais également pour renforcer la dichotomie morale qui existe déjà dans l'opinion populaire et dans plusieurs autres secteurs de la société. Aucun distributeur de vidéos n'estime que ses produits ont un caractère pornographique. Les productions vidéo sont diversement qualifiées de "films pour adultes", de "films de sexe" ou de "films érotiques". Dans ce contexte, les distributeurs justifient leur activité en soutenant que les films ou les vidéos



aux images qu'elles jugent les plus dégradantes, aux représentations où l'on associe la sexualité à diverses formes de violence ou à des enfants. A leurs yeux, ces représentations seraient intrinsèquement néfastes et imputables à un rapport dominant-dominé.

La pornographie est la présentation en direct ou simulée et rapportée, notamment, par la parole, l'imprimé, le film ou la vidéo, du comportement sexuel d'une ou de plusieurs personnes obligées, explicitement ou non, à s'exhiber, de personnes qu'on blesse ou qu'on maltraite physiquement ou psychologiquement, ou de situations dans lesquelles l'inégalité des pouvoirs est évidente ou suggérée par le jeune âge de certains participants ou le contexte de la présentation, et dans lesquelles ce comportement est préconisé ou endossé.

D'autres groupes conscients des revendications féministes s'opposent aux "féministes" qui cherchent à faire obstacle à certaines formes d'expression sexuelle ou s'interrogent sur le statut de telles représentations dans un langage culturel aux codes significatifs et sur leur association à des conditions sociales et économiques données (la photographie, par exemple)<sup>7</sup>. D'autres enfin, examinent la possibilité de créer une imagerie ou une littérature érotiques propres aux femmes<sup>8</sup>.

Le débat qui entoure la pornographie est chargé d'émotions et marqué par d'étranges alliances politiques. Pour compliquer les choses, la pornographie ne se laisse pas définir facilement. Elle n'en comporte pas moins certaines caractéristiques faciles à reconnaître: elle concerne les tabous sexuels inscrits dans la vie courante, et les personnes qu'elle donne en représentation ne possèdent qu'une seule dimension, une dimension sexuelle ou génitale<sup>9</sup>. Comme la conception que s'en font les groupes politiques et des luttes qui s'ensuivent<sup>10</sup>.

Les distributeurs que nous avons interviewés offrent des représentations vidéo ou graphiques à caractère sexuel,

Toute analyse de la pornographie doit être précédée d'un examen de ses diverses composantes et de l'établissement d'une définition accessible du phénomène et du discours qui y est associé. La chose n'est pas facile. En effet, les factions s'affrontent et les points de vue théoriques divergent. Les plus conservateurs s'inquiètent de la dégradation des moeurs et, face à l'émergence de diverses formes de pluralité sexuelle, ils craignent la désintégration de la cellule familiale. L'affaiblissement des valeurs sociales est associé à des représentations d'une sexualité "malsaine", c'est-à-dire d'une sexualité qui se manifeste à l'extérieur du cadre traditionnel et qui n'est pas fonctionnelle (en ce sens qu'elle ne vise pas la reproduction)<sup>1</sup>. Ceux qui professent une attitude plus libérale ou libérale voient dans la société un groupe pluraliste "dont les multiples points de vue ne coexistent qu'avec difficulté"<sup>2</sup>. La liberté d'expression ne doit cependant en aucun cas être reléguée au second rang par des considérations d'ordre moral.

La pornographie, quoi qu'on puisse en dire, devrait être accessible à tous, à moins qu'on n'établisse que sa présence dans la société heurte des personnes vaquant à leurs affaires ou qu'elle ne suscite un comportement anti-social - l'agression, par exemple<sup>3</sup>.

L'action féministe prend la forme de campagnes de sensibilisation et de manifestations. Les féministes soutiennent que le principal antagonisme social est celui qui s'exerce entre les deux sexes; elles réclament "un changement d'attitude du public par une redéfinition de ce qui constitue une représentation blessante"<sup>4</sup>. Récemment, elles ont cherché à démentir les accusations de pruderie dont elles font l'objet en s'attaquant

que nous avons rejoints étaient absents lors de notre visite. Quatre autres ont refusé de collaborer, en ne répondant pas à nos appels téléphoniques ou en affirmant qu'ils n'avaient "rien à dire". Deux des répondants interviewés (un dans chaque province) ont affirmé qu'ils tiraient la majeure partie de leurs recettes de la distribution de matériel pour adultes. Deux autres offraient également d'autres types de films à leur clientèle.

Les interviews devaient porter sur les sujets suivants.

- 1) Le produit: genre, pays d'origine. 2) Les affaires: nombre de détaillants, ventes mensuelles moyennes. 3) La demande: désirs et caractéristiques des consommateurs. 4) La législation: connaissance de la législation sur l'obscénité, de la réglementation douanière et de leur mode d'application. 5) La définition de la pornographie. 6) Les changements souhaités: législation et consensus social. Les interviews ont demandé, en moyenne, deux à trois heures. Les échanges étaient ouverts: de nombreux répondants ont abondamment parlé de sujets qui, même s'ils se rapportaient au sujet à l'étude, ne faisaient pas partie du plan d'enquête. Chaque fois que la chose s'est produite, nous avons pris des notes et rédigé sans retard un compte rendu de l'interview.

Pour préparer nos interviews, nous avons dû voir des vidéos (dans leur version québécoise et ontarienne) et parcourir les magazines pour adultes qu'on trouve dans les "magasins du coin" et les librairies "pour adultes" de l'Ontario ainsi que les boutiques porno (les "sex-shops") du Québec. L'auteur avait déjà une connaissance des écrits juridiques consacrés à la législation sur l'obscénité et de diverses affaires portées devant les tribunaux.

ou pendant l'interview; on peut donc estimer que l'échantillon représente bien les principaux distributeurs en activité.

On comprendra aisément que nous n'ayons pas eu de difficulté à trouver les distributeurs de vidéos pour adultes: leurs affaires marchent bien, ils s'identifient clairement et, souvent, ils sont associés à des distributeurs de films (deux des seize distributeurs que nous avons contactés n'ont cependant pas répondu à nos nombreux appels). Six des quatorze distributeurs de matériel vidéo (trois de l'Ontario et trois du Québec) n'offraient que des vidéos pour adultes; l'un d'eux acceptait les commandes postales. Le reste des distributeurs offraient également des longs métrages courants. Deux des répondants, enfin, distribuaient aussi des films 35 mm (qu'on projette habituellement dans les salles de cinéma).

Il a été plus difficile de rejoindre les distributeurs de magazines pour adultes. Cela vient sans doute de ce qu'ils ont longtemps fait l'objet de mesures de contrôle et qu'ils ne tiennent pas à se faire remarquer. Un membre de la sûreté du Québec nous a appris que, en l'absence de réglementation sur la censure, la police provinciale ne s'occupe pas de la production de vidéos destinées à la consommation privée, mais qu'elle concentre ses efforts sur la distribution des magazines obscènes. Cette personne n'a pas été en mesure de nous donner le nom des distributeurs de matériel vidéo ou de publications (des magazines, par exemple) sexuellement explicites. De même, les distributeurs de magazines que nous avons interviewés ont affirmé ne pas connaître l'origine (au Canada) des magazines sexuellement explicites - c'est-à-dire qui présentent des gros plans de rapports sexuels. Trois des distributeurs de magazines



(qui agit comme conseiller juridique). Au Québec, nous avons interviewé un distributeur de magazines et sept de vidéocassettes. En Ontario, nous avons interviewé trois distributeurs de magazines et sept de vidéocassettes. Nous avons également eu des échanges avec le responsable de l'escouade des moeurs de la police de la Communauté urbaine de Montréal et deux membres du projet "P" de Toronto. (Le projet "P" est mené conjointement par la Communauté urbaine de Toronto et la police provinciale de l'Ontario; il vise à mieux informer les agents de police sur la législation sur l'obscénité et la confiscation de matériel obscène.) Nous avons également interviewé par téléphone les distributeurs que nous n'avons pas été en mesure de rencontrer, des personnes qui travaillaient dans le domaine des divertissements pour adultes, de la pornographie ou de la censure, des représentants des Douanes, des membres de la Communauté urbaine de Montréal, des représentants de la Sûreté du Québec et du bureau de la censure de l'Ontario ainsi qu'un responsable de la Société de développement de l'industrie cinématographique canadienne.

Les personnes interviewées ont été choisies dans les provinces qui représentent vraisemblablement le mieux les extrêmes de la situation canadienne: le Québec et l'Ontario. En effet, c'est au Québec et en Colombie-Britannique que l'interprétation de la définition de l'obscénité est la plus élastique; l'Ontario, en revanche, est beaucoup plus conservatrice. Le nom des personnes que nous avons interviewées nous a été fourni au hasard des rencontres. Notre échantillon s'est ainsi constitué à la façon d'une boule de neige. Il convient d'ajouter que notre étude a principalement porté sur les régions de Toronto et Montréal. Pour les deux media, le nom des concurrents a surgi à l'occasion d'une prise de contact téléphonique avec un répondant



L'objet premier de cette étude consistait à concevoir un guide d'enquête et à entrer en contact avec des producteurs et des distributeurs de matériel pornographique dans le but d'évaluer leurs stratégies de commercialisation, leurs vues sur la législation actuelle sur l'obscénité et les conséquences des décisions judiciaires sur leurs activités, ainsi que l'idée qu'ils se font de leurs clients et des changements qu'ils aimeraient voir apporter à la loi.

Nous avons cependant vite constaté que, en dépit de nos efforts répétés, nous n'arrivions pas à entrer en contact avec les producteurs. En fait, la production légale de matériel pour adultes au Canada est fort restreinte, voire inexistante. Des distributeurs ont cependant acheté les droits de reproduction de certains films. S'il y a une production canadienne, elle est à coup sûr clandestine. C'est donc au niveau de la distribution qu'est choisi le matériel offert au public canadien. En modifiant la définition que donne le Code criminel de l'obscénité, on pourrait donc agir directement sur la distribution des vidéos et des magazines pour adultes.

Pour faire l'étude, nous avons réalisé vingt interviews, dont dix-huit avec des distributeurs de vidéos et de magazines, une avec le président de l'Ontario Advisory Committee (dont les services ont été retenus par les maisons de vente en gros de magazines et qui les conseille sur le consensus social actuel) et une autre avec le président de la Video Retailers Association

ainsi que les conséquences d'un tel amendement.

En guise de conclusion, nous soulignons l'importance pour le législateur de donner plus de clarté et de cohérence à la législation sur l'obscénité et nous offrons divers commentaires sur la question de la représentation du sexe et du désir, sans égard au genre.

Cette étude présente de façon schématique les distributeurs canadiens de vidéos et de magazines dits "pour adultes" (qu'on pourrait qualifier plus simplement de "pornographiques") et de les méthodes de distribution.

L'étude s'ouvre par une présentation sommaire de la méthodologie utilisée. Le corps du travail est divisé en deux grandes parties, qui sont elles-mêmes fonction des deux études: le matériel vidéo d'une part et le matériel imprimé d'autre part. Ces deux media ont été choisis pour leur persistance et leur caractère populaire (le domaine de la vidéo se développe actuellement à un rythme effarant); de plus, c'est principalement sur eux que portent les critiques émanant des divers secteurs de la société.

L'étude présente une description du matériel généralement offert au public, un survol du genre d'images présentées aujourd'hui dans les vidéos et les magazines pour adultes ainsi qu'un aperçu de l'idée que se font les distributeurs du consommateur moyen. Suit une analyse des aspects juridiques de la distribution des vidéos et magazines pour adultes, des répercussions de la définition de l'obscénité sur les activités des distributeurs et du rôle des douanes et des bureaux de censure dans l'industrie des divertissements pour adultes.

Dans les trois sections qui suivent, nous montrons succinctement comment les distributeurs perçoivent le consensus social actuel et nous décrivons les modifications qu'ils aimeraient voir apporter à la définition de l'obscénité.



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